HUMAN RIGHTS IN UKRAINE – 2006

HUMAN RIGHTS ORGANIZATIONS REPORT

UKRAINIAN HELSINKI HUMAN RIGHTS UNION

KHARKIV HUMAN RIGHTS PROTECTION GROUP

KHARKIV

«Prava Ludyny»

2007

ББК 67.9(4УКР)
П68

In preparing the cover,
the work of Alex Savransky was used (www.petik.com)

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The book is published with the assistance of the International Renaissance Foundation
and the Democracy Fund of the U.S. Embassy, Kyiv

The views of the authors do not necessarily reflect the official position of the U.S. Government

Human Rights in Ukraine – 2006. Report by Human Rights Organizations. / Editors Y.Zakharov, I.Rapp, V.Yavorsky / Ukrainian Helsinki Human Rights Union, Kharkiv Human Rights Protection Group – Kharkiv: Prava Ludyny, 2007. – 472 p.

ISBN 978-966-8919-28-2.

This book considers the human rights situation in Ukraine during 2005 and is based on studies by various non-governmental human rights organizations and specialists in this area. The first part gives a general assessment of state policy with regard to human rights in 2005, while in the second part each unit concentrates on identifying and analysing violations of specific rights in 2005, as well as discussing any positive moves which were made in protecting the given rights. Current legislation which encourages infringements of rights and freedoms is also analyzed, together with draft laws which could change the situation. The conclusions of the research contain recommendations for eliminating the violations of human rights and fundamental freedoms and improving the overall situation.

ББК 67.9(4УКР)

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ISBN 978-966-8919-28-2

FROM THE EDITORS

This report focuses on the human rights situation in Ukraine in 2006 and the first five months of 2007. It contains a «Civic Assessment of government policy in the area of human rights» and an in-depth analysis of specific aspects of the human rights situation during the period in question. The scope of both of the above has been considerably expanded since the previous years' reports. Sometimes this broadening resulted in entirely new sections, for example, on the work of the Human Rights Ombudsperson; domestic violence; human trafficking; labour rights; the right to education; the right to health care, and a special section on the environmental and human consequences of the Chernobyl Disaster.

The Ukrainian Helsinki Human Rights Union and the Kharkiv Human Rights Protection Group would like to gratefully acknowledge the enormous help offered us in creating this Human Rights Organizations Report. First and foremost we wish to thank:

The organizations which kindly provided material for this report:

– The All-Ukrainian Environmental Organization «MAMA-86» ("MOTHER-86");
– The Civic Organization «Centre for Legal Awareness» (Kalush, Ivano-Frankivsk region);
– The Civic Organization «Donetsk Memorial»;
– The Civic Organization «For the rights of each of us» (Kremenchug);
– The Civic Organization «Helsinki Initiative-XXI» (Chortkiv, Ternopil region);
– The Civic Organization «M'ART» [Youth Alternative], Chernihiv;
– The Civic Environmental and Humanitarian Association «Zeleny Svit» [«Green World»];
– The Committee on Monitoring Press Freedom in the Crimea;
– The Environmental Organization «Pechenihi» (Kharkiv);
– The Institute of Mass Information (Kyiv);
– The International Association «Environment – People – Law» [EPL] (Lviv);
– The International Society for Human Rights, Ukrainian Section (Kyiv, Dnipropetrovsk);
– The International Women's Human Rights Centre «La Strada – Ukraine»;
– The Lviv Regional Free Education and Science Trade Union;
– The Kherson Regional Charity and Health Foundation;
– The Kherson Regional Branch of the Committee of Voters of Ukraine;
– The Kirovohrad Children's Environmental Organization «Flora»;
– The Luhansk Regional Branch of the Committee of Voters of Ukraine;
– The Media Law Institute (Kyiv);
– The National Ecological Centre of Ukraine;
– The Odessa Human Rights Group «Veritas»;
– The Odessa Regional Branch of the Committee of Voters of Ukraine;
– The Public Committee for the Protection of Constitutional Rights and Civil Liberties (Luhansk);
– The Regional Information and Defense Centre of Sexual Minorities "Our World" (Kyiv);
– The Religious Information Service of Ukraine (RISU);

– The «Respublica» Institute (Kyiv);
– The Ukrainian Association «Zeleny Svit»;
– The Union «Public Watch» (Nikopol, Dnipropetrovsk region);
– The Vinnytsa Human Rights Group;
– Amnesty International;
– Human Rights Watch.

The authors and co-authors of particular units, as well as the researchers of material used here:

Taras Antoshevsky; Yury Babinin; Larisa Baida; Ruslan Belsky, Anatoly Boiko; Oleksandr Bukalov; Ruslana Burova; Serhiy Burov; Arkady Bushchenko; Maksim Butkevych, Volodymyr Chemerys; Inga Dudnyk, Serhiy Fedorynchyk; Mykola Feldman, Dmytro Groisman; Hanna Holubovska-Onisimova; Olena Hrabovska; Olha Kalashnyk; Oleksy Kinebas; Mykola Kozyryev; Kateryna Levchenko; Viacheslav Lichachov, Hennady Marushevsky; Olha Melen; Yaroslav Movchan; Oksana Nesterenko; Andriy Olenyuk; Yevheniya Pavlova; Mykhailo Popadyn. Volodymyr Prytula, Vsevolod Rechytsky; Andriy Rokhansky; Mykhailo Romanov, Irina Sarancha; Oleksandr Severyn; Serhiy Shaparenko; Maksim Shcherbatyuk; Andriy Sokolov; Oleksandr Stepanenko; Andriy Tolopilo; Olena Volochai; Yaryna Volvach, Vyacheslav Yaskubenko; Maria Yasenovska; Maryana Yevsyukova; Inna Zakharova.

This report would not have been possible without the support and assistance of Halya Coynash, Volodymyr Derkachov, Irayida Fesenko, Viktor Kochuryn, Oleh Myroshnychenko, Oleksandr Savransky, Vitaly Svyatsky, Serhiy Udalov, Volodymyr Uryvay and Boris Zakharov

We would like also to express our gratitude to those who provided financial assistance for this Report:

– The Democracy Fund of the Press, Education and Culture Department of the Embassy of the USA;
– The International Renaissance Foundation;
– The National Endowment for Democracy (USA);
– The Open Society Institute (Budapest).

Yevgeniy Zakharov, Volodymyr Yavorsky

CIVIC ASSESSMENT OF GOVERNMENT POLICY IN THE AREA OF HUMAN RIGHTS

GENERAL OVERVIEW[1]

Our report focuses on the human rights situation in Ukraine during 2006 and in the first five months of 2007.This was an extremely difficult period shaped by a struggle for power between various political forces resulting in a fully-fledged political crisis. Human rights were recalled in the main in order to legitimize the particular side's actions, while there remained no real steps towards improving the situation. The issue of affirming and defending human rights was, in the first place, not a high priority for the government. It is also fairly difficult to do anything to achieve such an improvement in such politically unstable times when any step by the authorities, whether it be a draft law or appointment to some post is assessed first and foremost in terms of the political dividends it may bring in the political battle. The politicizing of any issue and resolving of such issues through the prism of the interests of ones own political force, and not impelled by the interests of society and of the country, led to the human rights situation either remaining unchanged or actually deteriorating during this period. Those changes for the better which did, nonetheless take place occurred largely through the efforts of human rights organizations and were less thanks to government support than despite this.

This general thesis will be developed and given specific detail throughout the sections of this report, both with regard to social processes, and in terms of specific rights and freedoms.

The political confrontation had an extremely negative impact on the independent and proper functioning of the judiciary and observance of the principles of the rule of law.

A well-known definition of democracy is that once given by Lech Walęsa, that it is a war waged by everybody against everybody under the control of the law. We certainly notice the war of all against all however control over it was missing from October 2005 with the Constitutional Court effectively not working. The blocking of the Constitutional Court's work was one of the most flagrant examples of the tendency to abuse the law which has gradually become endemic. Ukrainian politicians are prepared to carry out any actions which they deem politically expedient regardless of whether these violate the Constitution or laws, or the principles of the rule of law.

For example, the former Speaker of Parliament Volodymyr Lytvyn deliberately put off swearing in new Constitutional Court judges, claiming that this was in order to ensure «order» and «stability» in the country. The former Head of the Supreme Court Vasyl Malyarenko resigned for the period of the parliamentary election campaign. This was formally due to his inclusion among the first five names on the candidate list for State Deputy of Volodymyr Lytvyn's bloc. In so doing, the former Head of the Supreme Court not only violated special legislation regarding the judiciary and political parties, prohibiting judges from any political activity, but also made his (mandatory) official appearance at the swearing in of the Constitutional Court judges impossible.

We can conclude that parliament during that period from October 2005 to April 2006 was trying to assume for itself the role of some kind of «main power» in the country. It not only failed to appoint the specified number of judges according to its quota, but also prevented the judges already appointed from commencing their duties. However severe this may sound, the actions of the Ukrainian parliament in this situation must be qualified as a dangerous encroachment on the principle of constitutional legality, and the political strategies used by former Speaker Lytvyn and former Head of the Supreme Court Malyarenko as politically motivated and a direct abuse of their official positions. And when now Volodymyr Lytvyn sharply criticizes the «political reform» [the constitutional changes from December 2004] and says that there should have been parliamentary

[1] By Yevhen Zakharov, Co-Chair of KHPG and Head of the Board of UHHRU.

elections at the beginning of 2005 this only demonstrates his insincerity as a politician. Another example of the same ilk is provided by the participation in the electoral campaign of the Authorised Human Rights Representative of the Verkhovna Rada (the Human Rights Ombudsperson), Nina Karpachova. More detail is given in the section analyzing the work of the Ombudsperson.

The insincerity, dishonesty and reluctance shown by Ukrainian politicians to call things by their own names, their disregard for procedure, lack of respect for the court and failure to implement its rulings result in neglect of the rule of law.

There were many who hoped that the renewed functioning of the Constitutional Court in August 2006 would change the situation for the better. This is much more important than the election of the government. Governments in Ukraine exist for a year, 18 months, no longer, while the judges of the Constitutional Court (CC) are appointed for nine years. All decisions which were taken in the absence of the Constitutional Court are basically not legitimate, and could now in theory be cancelled by the Court. It was precisely the panic-stricken fear that the CC would abolish the constitutional amendments passed on 8 December 2004 that led to the blocking of the Court's functioning which is nothing but a usurping of power by Parliament. This fear can also explain the naпve idea that supposedly, in accordance with the Transitional Provisions to the Constitution, Parliament has the right to interpret the Constitution in the absence of the CC. It was the same fear that prompted Parliament to pass Law № 1253, which prohibits (!) the Constitutional Court from reversing the amendments to the Constitution passed on 8 December 2004. And the President, who should have used his power of veto, without a murmur signed a law which patently violates the Constitution.

However hopes that the CC would exert a positive influence proved vain. It was incapable of taking a single decision over 10 months, even making a judgment on the unconstitutionality of Law No. 1253. This was as a result, firstly, of the low professional level of a large number of judges, and secondly, their dependence on the political forces behind their appointment. The amendments to the Constitution to a large extent deprived the Constitutional Court of its independence. Following these amendments, the Constitution now allows parliament and the President to not only appoint judges to their post for 9 years, as before, but also to dismiss them. Bearing in mind the highest salaries in the country – around 60 thousand UAH a month, this has made CC judges susceptible to political pressure. Confidence in the CC was finally undermined by the accusations levelled against Judge Suzanna Stanik of corruption. We are forced to acknowledge that the Constitutional Court is at present corrupted and it is questionable whether in fact Ukrainian politicians will comply with its judgment. Ukraine at the present time cannot be considered a law-based State since it is the Constitutional Court which ensures this. This situation has continued for almost two years now. Time will tell whether the Constitutional Court will be able to regain its lost respect and authority.

One could go on and on citing examples of abuse of the law. This abuse may not be in the actions themselves, but in the failure to act. The President, for example, was simply obliged to seek the Constitutional Court's judgment as to whether the vote for changes to the Constitution as part of a «package vote», together with changes to ordinary laws, in December 2004 had been constitutional. However political deals proved more important for him than his duties as Guarantor of the Constitution and human rights.

Since December 2004 human rights organizations have on many occasions publicly spoken about the dangers inherent in these changes. It is profoundly frustrating to see all our predictions coming true. The implementation of these amendments has led to competition between legitimate and real centres of power – the President and Prime Minister – within one executive branch of power with this leading to the country becoming ungovernable. The constitutional amendments have effectively jeopardized state sovereignty and the country's independence altogether. They have created a rift in the unity of foreign and domestic policy, introduced principles of the worst political collectivism, transforming Members of Parliament into voting machines, totally dependent on the will of their leaders, or one could even call them owners of their factions. The changes have significantly increased the influence of powerful financial and industrial groups on parliament while at the same time decreasing the access of the public to the authorities. One needs to recognize that a good and just aim, that being to eliminate authoritarian rule by a President through limiting his/her

powers, has been achieved through inept legal means. The fatal consequences of the changes to the Constitution mean that they must be reviewed.

The old opposition of «them and us», which had slightly receded over the last two years, is again coming to the forefront. I saw this telling text in a letter from one of the rank and file members of the «Batkivshchyna» [«Motherland»]

«They've» taken all our national riches from us, and they're now concentrated in the hands of several hundred families. «They've» taken from us the right to elect worthy people to the Verkhovna Rada. We are forced to vote for «their» party lists. «They've» taken from us the right to have impact on the policy of the country via the President, having taken away his powers. «They've» taken from us the local councils, and now, after introducing the Law «On the imperative mandate», they are overtly making them subordinate. Farewell to local self-government! The fate of any territorial community will now depend only on the will of the «party curator» of the given territory. «They» want new elections to finally get rid of all others.

Chamberlain once wrote in a work entitled «Ukraine – a subjugated nation» that the Ukrainian political elite constantly betrayed its own people. However he wrote those words about times of political lack of freedom, whereas now we are observing the moral betrayal of the Ukrainian people by the elite under conditions of State sovereignty.

The unfortunately «political reform» brought the political elite and the people into conflict. This conflict could not continue for long. Sensing that, President Yushchenko took the initiative into his own hands and called early parliamentary elections. He is also proposing that a new Constitution be created. However awkward the legal justification for these actions may be (more detail about this in the section: «The situation and trends in constitutional legislation»), from the moral point of view, we believe that the President's moves are justified. However the conflict has not been resolved, but has moved into a passive phase. And the «scene after the battle» creates an extremely gloomy impression, with almost all institutions of power compromised. The only solution would seem to be a return to the law which in turn appears impossible without rejecting the present constitutional model, without the creation of a new Constitution and without judicial reform to ensure real independence of judges and the courts.

A Strategy Plan for Judicial Reform to ensure fair trial in Ukraine in accordance with European standards[2] was developed in December 2005 by the National Commission for the Strengthening of Democracy and the Rule of Law. The Strategy Plan received a possible assessment from the Council of Europe's Venice Commission and was later affirmed by the President in his adoption of an Action Plan for 2006 on reforming the judicial system on the basis of the Strategy Plan. This Strategy Plan is aimed in the first instance at improving the court system, reforming the system for selection and professional development of judges, making amendments to the system for judges' disciplinary liability, as well as at increasing the role of self-government of judges and decreasing the administrative load of court chairpersons. The Strategy Plan separately addresses the issue of court financing. Effectively all criticism of the Strategy Plan has come from parties defending their own corporate interests and with no interest in real reform. In our opinion, if supported by parliament, this Plan could significantly increase court defence where rights have been infringed. The draft laws aimed at implementing the Strategy Plan were submitted to parliament by the President at the end of 2006. Their adoption is, however, in jeopardy as a result of the political confrontation, as well as because high-level judges are trying to protect their corporate interests. It should also be mentioned that judicial reform is being hampered by the lack of clarity with regard to the status of the Prosecutor. In addition, the constitutional amendments of December 2004 also returned the Prosecutor the old Soviet general supervision role which in general runs counter to the development of a strong and independent judiciary. This is an enormous step backwards in the reform of the Prosecutor's office to bring it into line with European standards, and is a breach of Ukraine's commitments given when entering the Council of Europe back in 1995.

From December 2006 the situation as regards certain human rights deteriorated when compared with 2005 and the period up to autumn 2006. (this can be seen, for example, by the lack of progress

[2] The text of the Strategy Plan has been placed (in Ukrainian) on the official website of the Ministry of Justice: http://www.minjust.gov.ua/?do=d&did=7306

in implementing recommendations from our previous report, as the table below shows). This was first and foremost in the heightening of administrative pressure on small and middle-level business due to the return of checks on businesses by the Tax Inspectorate with a previously set amount in fines which according to plan needed to be extracted (this is effectively a return to the practice in Kuchma's time). Various factors – a business climate more typical for some third-world countries than for European states, the lack of a tax code and the annual game with taxes; corrupt officials; constantly arising threats to the simplified system of taxation all serve to hamper the development of small business, and as a result prevent an increase in the middle class. At present Ukraine has approximately 1 million legal entities or individuals engaged in business, and there should be four times more, if we compare these figures with the USA or other countries with a high standard of living (per head of population). In this context, one must also mention the trend towards expansion of executive bodies and controlling bodies (the Control and Audit Department, the Tax Inspectorate and others) which are controlled by one political faction – the Party of the Regions, and the restoration of old mechanisms for allowing «their» businesses to avoid paying tax, as under Kuchma.

There has been an increase in administrative pressure also on people in Ukraine as a result of substantial increases in the tariffs for housing and communal services. Clearly, the government cannot continue indefinitely to subsidize housing and communal services, and the responsibility for these needs to be transferred to other owners, with an inevitable increase in tariffs. However this increase must be transparent, well-founded and not lead to a fall in the standard of living. Instead the new tariffs are hard to understand and the government has done nothing to mitigate their consequences. It is pointless to count on subsidies as the procedure for receiving them is extremely complicated and degrading, and a considerable percentage cannot receive them at all. The government is violating people's rights through their failure to provide adequate social protection for those who are unable to pay for communal services at the new rates. The changes made to the procedure for receiving subsidies are inadequate, and the process remains long and humiliating. This is clearly a serious violation of the right to an adequate standard of living. According to official statistics, 28% of Ukrainians have an income which places them below the poverty line – 352 UH (per month). Although these statistics do not take into account undeclared income, a large number of Ukrainians are still just eking out an existence, and not living. On top of this comes an increase in the housing and communal charges which these people will simply not be able to pay.. And this then puts property rights in jeopardy since the issue will soon arise of forcibly evicting those who can't pay (like in Moscow where they build semi-barrack style communal accommodation with one WC for three families) on the outskirts of the city. A new law on subsidies is needed urgently in order to remove this tension and to protect the socially vulnerable. The 2007 Budget has virtually no provision for such protection.

Once again, after a year and a half's break, the problems of poverty and social inequality have risen to the fore. There is, unfortunately, a very dangerous trend emerging in the ever rising divide between rich and poor. The principle formulated by John Rawls in his work «The Theory of Justice», that inequality is beneficial for al, that if one person has become richer, then others will benefit at least a little, is not the case in Ukraine. At least one fifth of the population finds it very hard to get by. In comparison with economically developed countries the income of the poorer in society is 7-10 times lower than that of the rich. A country cannot be prosperous where many people can scarcely make ends meet. This generates considerable inequality where poor families are not able to give their children a decent education, while an illness can be like the end of the world. And what kind of equality can we seriously speak of when an unemployed former parliamentarian has gained the right to receive on a monthly basis approximately four times the salary of a current member of the National Academy of Sciences of Ukraine, or approximately 6 times the salary of a highest level professor in a Ukrainian university, or 12-13 times the salary of a top-category doctor, or around 20 times the salary of a highest level school teachers? One current Deputy costs the Ukrainian State as much as eight members of the Academy, or 12 professors, or 26 surgeons, or 40 teachers in secondary schools. The pension of a former National Deputy (MP) wavers between 80-90% of that which s/he received when in office. The wage differential for all those working in state-funded institutions is equivalent to 1:40. This data is concealed in documents on limited access not available to the

public. For comparison, in the Western Europe the ratio is 1:4, in the USA – 1:5 and these figures are open and stipulated by law. And this very parliament voted in a Budget for 2007 which suspends the force of laws on benefits for the majority of categories of people receiving such subsidies which is a clear violation of the Constitution.

The problems of poverty and inequality are exacerbated by the often almost feudal nature of the relations between employers and their staff. Here all depends on the particular qualities of the owner who in his/her whims experiences virtually no constraints. The spread of poverty and inequality is also fostered by the government's attitude to education which has effectively been left to fend for itself. This is perhaps the greatest mistake of the Ukrainian political elite. It is especially rural education which is suffering. A sober assessment is needed of the level of knowledge being provided by secondary and higher education. There is every reason to fear that the conclusions of such an evaluation would be devastating.

We did not observe any attempts to crush political opponents or use of law enforcement agencies as instruments of political struggle During the political crisis of April – May 2007 there were such attempts, however the law enforcement agencies avoided actions which could have been interpreted in that way.

The harsh criminal-legal policy remains a major problem. The National Commission for the Strengthening of Democracy and the Rule of Law has prepared a progressive Concept for reforming criminal justice. The reaction of the management in the law enforcement agencies to this Concept was typical. Each praised it in general, yet suggested retaining the status quo as regards their patch. The same was true of the draft Criminal Procedure Code. The one draft which has been under review for many years now does not comply with international standards, and the other which is being drawn up by a working group from the National Commission is at the stage of final touches and agreeing it with experts. One may hope that this new draft will meet modern demands, yet what its fate will be is difficult to predict, all depending very much on the political circumstances. Without changes to legislation, certain practices also remain. There is still widespread use of detention without court sanction. Although according to the Constitution this should be used only in exceptional circumstances, it is in fact detention *with* a court warrant that is rather the exception. Law enforcement agencies still widely apply remand in custody as a preventive measure. Effectively, as a result of shortcomings in legislation and practice, people are helpless before the law enforcement agencies and totally subject tot heir will, especially in the first hours after being detained. Human rights organizations continue to receive complaints alleging torture and ill-treatment during the detective inquiry stage and pre-trial investigation. Effective measures for countering the use of torture by the police have still to be introduced. Complaints about the behaviour of law enforcement officers are, as a rule, considered by the Prosecutor in a cursory and biased manner. The number of people acquitted by the courts remains pitifully low: in 2006 177,578 people were tried, with only 910 defendants acquitted, and on sentences which had already come into force, even less – only 516 people.[3]

Reforms have still not been made in the State Department for the Execution of Sentences [the Department]. It remains closed to public control, both parliamentary and non-parliamentary and has absolutely no system for reviewing complaints about the behaviour of penal administration staff. According to a letter from the Department dated 20 September 2006, during 2005 and the first six months of 2006, the number of complaints received alleging unlawful behaviour by staff of penal departments and institutions was 295 and 178 respectively. However the information in these cases was not once found to be warranted. Cases where employees faced disciplinary or criminal proceedings were not registered. For comparison, we can give figures provided by the Ministry of Internal Affairs (MIA). In 2006 the MIA received 5,128 complaints alleging unlawful behaviour. Of these, 455 were accepted as having substance (8.5%, which is approximately the same percentage of cases found to be justified as in developed democracies. At the same time, we are aware of numerous attempts at suicide or self-mutilation after which the media reported that the prosecutor's office had found violations by personnel. Of concern are the brutal actions of the spetsnaz [special forces) created within the Department and which are effectively under no external control. A confirmation

[3] Letter from the State Judicial Administration № 14-3554/07 from 08.06.07

of the fact that the practical use of special «anti-terrorist» subdivisions is fairly entrenched within the Department can be seen by the letter of the Head of the Department from 20 December 2006 in which he acknowledges that over 9 months of 2006, the special unit had carried out tactical and special training 9 times, and in 43 cases had been involved in carrying out searches of prisoners and premises, in rounds of the living and work zones in penal institutions and pre-trial detention centres [SIZO]/.

The Head of the Department Vasyl Koshchynets claims that the «anti-terrorist» special unit was used only for carrying out searches. However the letter does not mention that the unit's members wore masks during these operations. This is confirmed by all reports which mention large-scale beatings of prisoners by the special units. Such testimony would also fit with general practice in the case of anti-terrorist units of hiding the identity of officers to protect them and members of their families. In our opinion, the use of special anti-terrorist units to carry out searches is entirely senseless since the crushing of an armed threat by terrorists or quashing of a prison riot require totally different training than that need for carrying out a search. It is therefore difficult to believe that personnel trained in the effective use of force are being used not as intended, but in order to undertake searches. The very existence of special units within the State Department for the Execution of Sentences is ludicrous. The Department must at long last turn into a civilian service as in all European countries.

Unlawful force used against those suspected of having committed a crime, or against prisoners serving sentences engenders an attitude to brutality as to something acceptable which can be applied if for a good purpose. However brutality leads to even more brutality and the level of violence in society increases. It can very quickly move from criminals to all others.

Overall, the level of violence has risen if compared with that in 2005 and the first half of 2006. Political confrontation leads to an increase in aggression and the tendency to look for enemies. There have been several cases where monuments have been desecrated and there has been a rise in inter-denominational and inter-ethnic conflict. From September 2006 the number of cases of violence on racial or ethnic grounds has risen significantly, mainly in the East of the country. There were several reported killings, although only one was in fact confirmed. Foreign nationals studying in Ukraine speak of real psychological terror. The facts suggest that these phenomena (for example, marches by skinheads at night with candles which end with them beating all «non-Russians») are most likely instigated from outside. One has the impression that some protest actions which have a clear xenophobic odour are not only organized, but also paid for from outside. This includes, for example, marches in the evening near hostels housing students from other countries in Kharkiv. The marchers chanted «Ukraine for Ukrainians» and other aggressive slogans (in Russian, incidentally). Both the government and society must take a much more active and uncompromising stand against those who incite all forms of enmity. Changes are clearly needed to Article 161 of the Criminal Code which covers incitement to inter-ethnic and inter-religious enmity and insults, etc on these grounds, since in its present form it is not leading to convictions for such crimes. We would note that the concept of «discrimination» does not appear in Ukrainian legislation. There is no clearly specified concept in law of either direct or indirect discrimination, and without this the general statements in the Constitution and legislation cannot be used to bring a person to answer for such crimes.

The problems remain of surveillance by the enforcement agencies over members of the public and interference in their private lives. Serious violations of the right to privacy are linked with the wish of the government to introduce a single universal code according to the concept of a Single State Automated Passport System (SSAPS) which will be used in all 14 registers kept by government bodies. SSAPS is being de facto implemented despite the lack of a law on maintaining registers and a basic law on personal data protection. This will lead to the creation of a shared database with which in a matter of seconds it will be possible to obtain data about any individual, information about marital status, income, taxes, property, credit history, trips, whether the person has a criminal record, etc. A country which introduces such a system can only be described as a police state. In February 2007 parliament adopted a resolution which approved the Regulations on new passports[4]. The Regulations

[4] The original specifies passports for travel abroad. In Ukraine, a person's identification document is also called a passport. The biometric details discussed here are only for passports for crossing State borders (translator)

make it possible to add to the passport a person's tax identification number and place a chip with biometric details. It is at present unknown what specific information will be included. These actions are unlawful. The Resolution was adopted deliberately, since had this been a law as it should have been, the President would have undoubtedly vetoed it. This practice, incidentally, of parliament to pass resolutions instead of laws so that the President cannot use his power of veto is entrenched and also speaks volumes about abuse of the law. We would note also that these resolutions, according to current legislation, cannot be appealed in court.

There are also infringements of confidentiality of communications as a result of a considerable degree of interception of messages (landline and mobile telephones, email, monitoring of traffic in real time). Again there is no law allowing for such measures, while the scale of such activities is extremely large – over the first 9 months of 2005 there were 11,000 warrants for interception of communications channels, whereas criminal proceedings were launched only in a few dozen cases. This means that the effectiveness of investigative operations is extremely low. Yet the statistics for such investigative operations are classified. Is this not to conceal from the public the helplessness and unlawful activities of operational units? Numerous statements from government figures that they are being watched or that their phones are being tapped remain without any follow-up. It is not known whether such wiretapping had official sanction. It should be mentioned that this issue has been under the constant attention of the President who has repeatedly stressed that unlawful surveillance and who signed Decree № 1556 on 7 November 2005 on measures to prevent it. We feel, however, that the enforcement agencies are not in a hurry to support the President in this. On the contrary, there have been no measures whatsoever which would make the law enforcement agencies accountable to the public, including on issues of control over sharing of information. The Security Service [SBU] is still continuing to introduce a system of monitoring of telecommunications through several Internet providers who control more than half, and in the regions, more than two thirds of Ukrainian traffic.

There has been an increase in infringements of freedom of speech and journalists' rights, especially at the regional level. There were considerably more assaults on journalists in 2006 and the first half of 2007 than in the previous year and a half. The National Deputy from the Party of the Regions Oleh Kalashnikov who assaulted members of a TV STB filming crew in July 2006 has still not been punished and continues to represent his faction. As in Kuchma's time, the local authorities put pressure on media outlets. The latter are subjected to attempts at control either by the authorities, or by their owners who are often closely connected with local politics. As a result of this, the media often produce material to order under the guise of news or information. This undermines the authority of the mass media in a democratic society and poses a real threat to freedom of speech. This was particularly noticeable during the 2006 parliamentary election campaign when it was virtually impossible, without financial support, to get news coverage even where such coverage was entirely warranted. The creation of public broadcasting is being stalled, and a clear position has yet to be developed on privatizing State-owned and municipal media outlets. This process is being held up also by journalists themselves who don't want to lose the special perks they have for working in such media outlets, since their salaries are calculated as for civil servants. Most frustratingly, journalists of private media outlets are asking for the same benefits, seemingly not understanding that this is just a way for the authorities to keep control over journalists.

The unwarranted classifying as secret or restriction of access to official information remains a problem. There have been no legislative changes in this area. Changes which were supposed to improve the Law «On information» were never in fact passed. The prosecutor's office remains the least open state body in the country. Its normative acts are not registered by the Minister of Justice and are often entirely unknown since they are not published (for example the Instruction on Procedure for working with citizens', or the List of data which is classified as being information on restricted access and which receives the stamp «For Official use only» (including, «Special reports about catastrophes, accidents and natural disasters»?!). These documents of the Prosecutor General became publicly known entirely by chance.

The lack of openness of information, transparency and accountability of the regime to society, the unwarranted classifying of information and limitation of freedom of exchange of information

must be viewed as among the most dangerous for the future of the country in comparison with other violations of human rights. The issue is not even only that this creates the right conditions for the spread of corruption. The information sphere is the main field on which all political, administrative, economic and quite simply any other decisions in the fields of human activity are based. The more information is used in taking these decisions, the better motivated and more effective they will be. The most important political decisions are usually consolidated at the legal level and enshrined in various normative acts. In this way, we have a three-tier system for decision-making: information, politics and legislation. One can use the metaphor of a tree: roots, trunk and crown. The more developed the root system, the stronger the tree. And when at the legislative (third) level acts are passed which prohibit or limit access of the participants in controversial political debate (the second level) to information (to the first level), then the quality of the political decisions will inevitably deteriorate. The unnatural situation arises where the crown does not let its own roots nourish the tree. This happens particularly often in cases where there are attempts by the State executive or even parliamentary institutions to limit and control the information flow. This is usually done with the best intentions, yet societies thus blighted by isolationism end up in stagnation, their intellectual elite emigrating and their economic complex turning into a supply of raw materials for their more open and therefore more dynamic neighbours. It is vital, therefore, to reassess present priorities in information policy and to strengthen the openness of information at the legislative level.

Our analysis indicates that the situation as regards certain human rights and fundamental freedoms has deteriorated since December 2006. The implementation of previously developed reforms – concepts for judicial reform, free legal aid, the reform of the criminal justice system, adoption of progressive draft laws on interception of telecommunications, on personal data protection, and changes to the Law «On information» – have stalled. The measures planned for implementing the EU-Ukraine Action Plan on affirming democracy and the rule of law have effectively not been carried out. Implementation has also been stalled of Presidential Decree № 39 from 20.01.2006 on meeting Ukraine's commitments to the Council of Europe and other human rights-related Decrees.

The Gongadze case remains unsolved since neither the organizers nor those who ordered the killing have been brought to justice. There has been no official confirmation of the authenticity of Melnhychenko's tapes which could serve as vital evidence in the cases of Gongadze, Yelyashkevych and many others of prominence from the Kuchma period. There has been no breakthrough in the investigation into Yushchenko's poisoning, or the beating by «Berkut» forces of Yushchenko supporters during the early hours of 23 October 2004 near the Central Election Commission [CEC] headquarters although the entire attack was recorded on video, nor into the interference with the CEC server or the manipulations during the vote count on 21 November, as well as other serious charges involving vote-rigging during the 2004 Presidential elections.

In concluding, we would note that government policy on affirming and safeguarding human rights and fundamental freedoms remains unsystematic, chaotic and ineffective. Furthermore political expediency and the internal interests of government bodies are given significantly more weight than the interests of the public, and therefore the activities of these agencies are largely aimed not at affirming human rights, but at pursuing ephemeral governmental or personal interests

We are once against forced to note that all modern history demonstrates that a political regime which violates human rights and the rule of law ever more overtly is sooner or later doomed.

RECOMMENDATIONS MADE BY HUMAN RIGHTS ORGANIZATIONS IN *HUMAN RIGHTS IN UKRAINE – 2005,* AND THE DEGREE TO WHICH THEY HAVE BEEN IMPLEMENTED

RECOMMENDATIONS	MOVEMENT ON THE RECOMMENDATIONS IN 2006
THE RIGHT TO LIFE	
1. Introduce changes to legislation on criminal procedure in order to provide more rights to victims, as well as to the families of those killed, and increase their influence on the course of investigation.	Not implemented. It should be noted that attention was given to this issue in the Strategy Plan for reform of the criminal justice system and of the law enforcement agencies which was being drawn up during 2006 by the National Commission for the Strengthening of Democracy and the Rule of Law, as well as in the new draft Criminal Procedure Code.
2. Introduce efficient independent mechanisms to investigate deaths caused by the actions of law enforcement officials and / or medical staff.	Not implemented.
3. Publish annual reports on investigations into crimes against life.	Not implemented, however the results of investigations are provided in response to information requests
4. Introduce independent forensic medical expert opinions.	Not implemented.
5. Adopt a Law «On the rights of patients» that would provide for legal guarantees of the rights of patients to life	Not implemented.
FREEDOM FROM TORTURE	
1. Ratify the Optional Protocol to the UN Convention against Torture and set about creating the national preventive mechanisms envisaged by the Protocol.	Implemented, however a year after ratification, no national preventive measures have been created
2. Adopt at legislative level a strategy for creating a system of prevention and protection from torture and ill-treatment, as well as an action plan, based on this strategy, with clearly defined directions and stages of activity.	Not implemented.
3. Bring the elements specified of the crime of «torture» into line with Article 1 of the UN Convention against Torture.	Not implemented.
4. Institute the gathering of statistical data in courts and law enforcement agencies on crimes which contain elements of «torture» in the understanding of Article 1 of the UN Convention against Torture.	Not implemented.
5. Make it impossible to apply amnesty and parole for people who have committed actions, which have elements of «torture» in the meaning of Article 1 of the UN Convention against Torture.	Not implemented.
6. Promote the creation of effective mechanisms of public control over investigations into allegations of torture and ill-treatment.	Not implemented.

7. Provide by legislative means for the activities of non-state experts and expert bureaux.	Not implemented.
8. Ensure access by victims to medical documents which are of importance in proving torture or ill-treatment.	Not implemented.
9. Assign the same validity as evidence to conclusions provided by independent medical and other experts, who conduct studies at the request of the alleged victim of torture or their legal representative, as that of conclusions made by experts assigned by an investigator or the court	Not implemented.
10. Provide individuals who initiate an investigation or other legal procedure regarding allegations of torture or ill-treatment access to free legal aid should they be unable to pay for the services of a lawyer.	Not implemented. This is partly being carried out by civic organizations with financial assistance from western charities
11. Provide provisions in Ukrainian legislation on the inadmissibility of any testimony of the accused (suspect) received at the pre-trial stage of the criminal investigation without the presence of a lawyer.	Not implemented.
12. Provide the appropriate guidelines to prosecutor's offices and judges on using measures to ensure the safety of individuals who have made an allegation of torture, in particular, if such an individual is held in custody, then to move him or her to another remand centre	Not implemented.
13. Eliminate the practice whereby judges «extend detention» of suspects held in police custody, or, at least, introduce necessary amendments in order to transfer people whose detention is extended by a judge to a pre-trial detention centre [SIZO], and not leave them held in police custody	Not implemented.
14. Introduce into legislation the right of access and the appropriate procedure for gaining access to an independent doctor and independent expert of the person detained's own choosing, especially for persons, who are held in custody	Not implemented
15. Review provisions of current legislation in order to provide the right to legal representation to people who allege that they were tortured, regardless of whether or not criminal proceedings have been initiated.	Not implemented
16. Provide clear guidelines to prosecutor's offices and judges concerning immediate consideration of claims and complaints related to investigations into torture.	Not implemented
17. Give individuals facing deportation to another country the right to court review of an appeal against the relevant decision of executive bodies, and appropriate court procedure capable of investigating the circumstances which could significantly influence the decision on deporting (extraditing) the individual to the other country.	Not implemented
THE RIGHT TO LIBERTY AND SECURITY	
1. Introduce amendments to legislation which would make detention without court sanction the exception, this being in compliance with the restrictions provided for by Article 29 § 3 of the Constitution.	Not implemented
2. Bring the time limit for bringing a person before the court, set down in Article 106 of the Criminal Procedure Code (CPC) into line with Article 29 of the Constitution, taking into account the time necessary for the court review and ruling	Not implemented
3. Define the starting point for detention on suspicion of committing a crime or an administrative offence based on the actual circumstances of the case, not on the decision of a law enforcement officer.	Not implemented

4. Define in law separate criteria of legality for detention and remand in custody and annul provisions in Item 2.5 of the Joint Order by Ukraine's Ministry of Internal Affairs and the State Department of Ukraine for the Execution of Sentences No. 300/73 of 23 April 2001, which considers a detainee's release when the suspicion is not confirmed or when the term of detention has expired as a breach of the law, and other similar instructions.	Not implemented
5. Include in the subject matter of detention hearings all circumstances pertaining to whether the detention was justified, including the following:	Not implemented
– grounds for the suspicion or charge, in connection with which the prosecution demands that the suspect (accused) be detained;	
– grounds for the period in which a person is held in custody by a law enforcement agency prior to being brought before a judge.	
6. Establish a clear presumption in favour of a person's release and provide that the onus of providing proof of grounds for detention be shifted to the prosecution.	Not implemented
7. Introduce provisions, which would exclude remand in custody or its extension on the basis of purely hypothetical assumptions	Not implemented
8. Formulate the risks in connection with which detention is allowed in such a way as to exclude remand in custody depending on the position of accused and tactics employed by the defence.	Not implemented
9. Introduce provisions which would exclude the practice of detaining a person after his/her release by a judge on the basis of «concealed» accusations.	Not implemented
10. Exclude from legislation the institution of «detention extension» by a judge, or, at least, introduce necessary amendments to the legislation, in order to exclude the practice of returning a person to a police unit after detention has been extended.	Not implemented
11. Introduce amendments to Article 165-2 § 4 of the CPC, in order to exclude detention without court control for longer than the period established by Article 29 § 3 of the Constitution.	Not implemented
12. Entitle people remanded in custody to seek periodic review of the lawfulness of their detention	Not implemented
13. Establish clear and detailed procedural rules for court review of whether to remand a person in custody or release him or her pending trial, in particular ensuring the following:	Not implemented
– mandatory participation of the person, who has been deprived of liberty, in any detention hearing where the question of his or her remand in custody or release pending trial is being considered;	
– the accused and his/her lawyer must be provided with a copy of the investigator's (prosecutor's) request for his/her remand in custody or extension of custody	
– the remanded person and his/her lawyer must be given the right to study the materials, which justify the request for his/her remand in custody or extension of custody	
14. Prepare procedure, which would encourage the use of bail instead of detention;.	Not implemented
15. Define more clearly the judge's scope of powers concerning remand in custody, in particular, to establish clearer criteria for exceptional cases, when a judge can go beyond the margin of his/her general authority.	Not implemented
16. Shorten the maximum term of detention during pretrial investigation	Not implemented

17. Introduce into legislation a maximum term of detention during court hearings.	Not implemented
18. Bring the rules of administrative detention into conformity with the requirements of Article 29 of the Constitution.	Not implemented
19. Introduce amendments to legislation which would exclude the use of administrative detention for the purpose of criminal investigation, for example, by providing mandatory release of a person suspected of having committed an administrative offence pending the hearing into the case.	Not implemented
20. Introduce amendments to the Code of Administrative Offences (in particular, to Article 26) and other legislative acts, which would exclude police custody of a person without a court order for over 72 hours	Not implemented
21. Provide procedure for court hearings concerning the detention of vagrants and people begging, or, at least, enable them to appeal against such detention and provide rules for such procedure	Not implemented
22. Ensure that detention and subsequent remand in custody of a person pending extradition is enforced exclusively on the basis of a court decision, as well as the right of a person remanded in custody pending extradition to periodic review of the detention.	Not implemented
THE RIGHT TO PRIVACY	
1. Adopt a Law «On personal data protection» complying with modern European standards for the protection of privacy	The draft law has been passed in its second reading. The draft was put to the vote several times. It was twice passed by parliament and vetoed by the President. It is presently being worked on by the Verkhovna Rada profile committee.
2. Ratify the Convention of the Council of Europe No. 108	Not ratified.
3. Adopt a Law «On interception of telecommunications» which will allow for independent monitoring of the activities of the Security Service of Ukraine [SBU] in intercepting communications, publishing an annual report with depersonalized information regarding the interception of information from communications channels in the course of investigative operations.	The draft law considered by parliament before the 2006 elections was not passed. In the post-elections (fifth) term of the Verkhovna Rada, work on the draft law was not commenced.
4. Ensure that a Single State Automated Passport System [SSAPS] is only introduced on a legal basis and taking into consideration the provisions of the Convention of the Council of Europe No. 108. The preparation of documents confirming citizenship of Ukraine must be under the control of government structures	SSAPS is being introduced unlawful and this recommendation is not being implemented
5. Put an end to the practice of illegally using the identification code of taxpayers for other purposes not stipulated by law. An individual must have the opportunity to know what information is contained in the card chip, and be able to have this changed. Different codes (classifiers of personal databases) must be used separately, and solely for the purpose for which they were created, and their use must be determined by a Law on Personal Data Protection	The situation has actually worsened, and this recommendation is not being implemented
6. The Ministry of Internal Affairs must stop the unwarranted collection of sensitive personal information about individuals (information regarding their political views, religious beliefs, sexual orientation, etc)	Not implemented.
7. Revoke Order No. 122 from 17 June 2002 of the State Committee of Communications and put a stop to the intrusion of state executive bodies into the activities of those involved in providing Internet services by forcing them to install equipment for the interception of telecommunications.	The Order was quashed by the Ministry of Justice, however it is continuing to function de facto
8. Abolish the licensing of IP-telephone systems.	Not implemented. It is effectively taking place according to the Law «On telecommunications».

FREEDOM OF RELIGION AND CONSCIENCE	
1. Ukrainian legislation should be brought into conformity with the demands of Articles 9 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the light of the court case law of the European Court of Human Rights, in particular, as regards ensuring the neutrality of the State, the possibility for a religious community to receive legal entity status and to freely practice their religion.. For this it would be desirable to apply the «Guidelines for Review of Legislation Pertaining to Religion or Belief» prepared by the OSCE / ODIHR and the Venice Commission in 2004.	Not implemented. The draft law being prepared by a Ministry of Justice working group does not comply with many OSCE and Council of Europe standards
2. In drawing up a new version of the law on religious organizations the focus should be moved away from checking out organizations at registration stage to monitoring their activity: to accordingly shorten and simplify the registration of religious organizations, making the procedure at least analogous with the registration of civic associations.	Not implemented. The Ministry of Justice draft law totally disregards this recommendation
3. Discrimination must be eliminated when registering the charters of religious communities and the grounds clearly defined for refusing to register or for cancelling the registration of the charters of religious communities.	Not implemented. The Ministry of Justice draft law totally disregards this recommendation.
4. The public authorities should not interfere in internal church matters, in particular, those concerning the creation of a single Local Orthodox Church., nor should they impose any particular single organizational structure, defend one of the sides in internal Church disputes, etc.	Not implemented.
5. Effective mechanisms are needed for avoiding discrimination on religious grounds, particularly in the penal system, the social sphere and in the area of labour relations. It is also vital to make adjustments to legislation on taxation of religious organizations in order to remove discrimination against non-Christian organizations.	Not implemented.
6. Law enforcement agencies must react appropriately to cases of incitement to religious hostility, especially from dominant religious organizations, and parties fighting organizations which they consider to be sects.	Not implemented
7. In order to eliminate discriminatory administrative practice and conflict between churches, clear legal norms need to be passed with regard to the grounds, procedure and time periods for returning church property. It would also be expedient to draw up a detailed plan for returning religious property with these procedures and the time taken for each place stipulated. Where it is impossible to return such property, provision of some compensation should be stipulated, in particular, for the construction of new buildings of worship.	Not implemented. The problem is deepening and becoming more acute.
8. Local authorities should review legislative acts they have passed which establish discriminatory provisions, and also additional limitations, not foreseen by the law, on freedom of religion when holding peaceful gatherings, renting premises, allocating land and returning religious buildings. General principles should also be clearly outlined for the allocation of sites for building places of worship.	Not implemented.
THE RIGHT OF ACCESS TO INFORMATION	
1. Declassify all normative legal acts classified with the stamps «Not to be printed» and «Not to be published», and scrutinize documents classified as «for official use only» in order to establish whether their classified status is well-founded	Not implemented

2. Adopt a new law on information which would guarantee the access to information in government bodies and bodies of local self-government on the basis of the Recommendations of the Committee of Ministers of the Council of Europe № R 19 (1981), REC 2 (2002), 13 (2000) of the UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention – adopted on 25 June 1998 and ratified by Ukraine in 1999); as well as other international standards on freedom of information.	Not implemented
3. Review the norms of Article 15 of the Law of Ukraine «On state secrets» so as to allow for only a specific text containing a state secret to be classified, and not the document as a whole.	Not implemented
4. Analyze «The List of items of information that constitute State secrets» in order to decide whether the classification is warranted, applying the three-component test of the European Court of Human Rights for determining whether there is «damage» and «impact on public interests», as well as Article 47-1 of the Law «On information	Not implemented
5. Revoke the Decree of the President of Ukraine № 493 from 21.05.1998. «On introducing amendments to some Decrees of the President of Ukraine on the state registration of normative legal acts».	Not implemented
6. Register all normative legal acts issued by the Prosecutor's office with the Ministry of Justice of Ukraine	Not implemented
7.Create an open register of all normative acts of the prosecutor's office and an open database of normative acts which concern citizens' rights and duties	Not implemented
8. Create the conditions enabling members of territorial communities to see all decisions passed by bodies of local self-government (depending on the conditions, in the most efficient manner). Thus, for example, where possible, to create websites of bodies of local self-government with mandatory posting of a full register as well as the actual texts of all decisions passed.	Partially implemented, but only in some places.
9. Ensure the publication and open access to all decisions passed by local administrations (at the level of regions, as well as the cities of Kyiv and Sevastopol)	Not implemented
10. Taking into consideration the case law of the European Court of Human Rights and principles of legislation on the freedom of information, develop an educational course on international standards of access to information and practice of their application in Ukraine, and carry out training for judges of local and appeal courts of all 27 regions of Ukraine and for public officials who work in public relations departments of government bodies and bodies of local self-government.	Not implemented
11. Run training courses for state officials on the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters	Not implemented
12. Representatives of the mass media, human rights and other civic organizations should monitor the efficiency of active and passive access to information at central and local levels, as well as using the courts more actively against the inaction of state officials with regard to the providing of information and refusals to provide information	Implemented. The results are presented in the appropriate section of this report.

FREEDOM OF EXPRESSION	
1. Implement a program for reforming State-owned media outlets by changing their system of management and financing in accordance with the recommendations of the Council of Europe and OSCE. The best example of such reform is the introduction of public TV and radio broadcasting on the basis of UT-1 National Television Channel and the First National Radio Channel.	Not implemented. Draft laws on reforming the media are being developed, but stalled.
2. Draw up and introduce the appropriate legislation and programs of self-regulation for journalists and media outlets in order to reduce the spread of information material which is paid for or produced on commission with infringements of journalist standards of objectivity and balanced presentation of information.	Not implemented.
3. Abolish the laws «On the procedure for media coverage of the activities of public authorities and bodies of local self-government in Ukraine» and «On government support for the media and social protection for journalists», allowing for the cancellation of particular benefits for journalists of State media outlets, and to ensure that they have the same rights as journalists on private media outlets	Not implemented.
4. Adopt a new version of the law on television and radio broadcasting which would comply with the standards of the Council of Europe, OSCE and the European Union.	Not implemented.
5.Iintroduce amendments to legislation making it possible to identify the real owner of a media outlet, especially of television channels and radio stations; introduce effective control over the concentration of media outlets in the hands of one owner or members of his or her family; to introduce anti-monopoly restrictions for the information market in compliance with recommendations of the Council of Europe, OSCE and the European Union; and introduce necessary procedure for punishing those who infringe legislation on the concentration of the media.	Not implemented, however a draft law aimed at resolving this problem is under consideration in parliament.
6. Ensure quick and transparent investigation into all reports of violence and deaths of journalists, as well as into cases of interference in journalists' activities	Virtually not implemented.
7. Accelerate the procedure for ratifying the European Convention on trans-border television, the Additional protocol to the Convention on trans-border television, and also introduce amendments to legislation on the implementation of its regulations, as well as the provisions of the EU Directive 85/552/EU, 97/36/EU «Television without Borders.»	Not implemented. The ratification procedure has been frozen
8. Disband the National Committee for Television and Broadcasting during an overall consideration of Draft amendments to the Constitution of Ukraine.	Not implemented.
FREEDOM OF PEACEFUL ASSEMBLY	
1. Prepare instructions for law enforcement agencies which regulate their behaviour during peaceful gatherings.	Not implemented, although at the beginning of 2007 such a document was being developed with the involvement of the MIA Public Council.
2. Carry out training of employees of special units and patrol units of law enforcement agencies in the following: ensuring public order during peaceful gatherings; protecting those participating in peaceful gatherings; the grounds and conditions for using special means and physical force; ensuring independent control over how they use their authority during peaceful gatherings.	Not implemented.

3. Translate into Ukrainian the Judgments of the European Court of Human Rights on Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms pertaining to the freedom of peaceful assembly and to provide copies of these translations to all local and appeal courts.	Not implemented.
4. Taking into account case law of the European Court of Human Rights, to prepare and run a training course for judges of local and appeal courts of all 27 regions of Ukraine as to applying Article 11 of the European Convention for the Protection of Human Rights in court practice with regard to applications from the authorities to ban peaceful gatherings	Not implemented
5. Ukraine's Supreme Court should provide general principles for court rulings in cases involving restrictions on the right to free assembly and demonstrations.	Not implemented.
6. pass a draft law on holding peaceful gatherings drawn up by Ukrainian human rights organizations in which the case law of the European Convention for the Protection of Human Rights and the positive practices in democratic countries are taken into consideration;	Not implemented. The draft laws registered do not comply with international standards.
7. Bodies of local self-government and State executive bodies should revoke all decisions adopting Regulations on rules and procedure for holding peaceful gatherings and using «small architectural forms», bring other decisions into compliance with the Constitution of Ukraine and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Prosecutor's Office of Ukraine should appeal through court procedure such decisions of local authorities where the latter have failed to respond.	Not implemented. Human rights organizations have achieved the cancellation of such regulations by lodging administrative suits with the court
8. The Human Rights Ombudsperson should pay more attention to violations by local authorities and law enforcement agencies of the right to peaceful assembly.	Not implemented.
9. Organizers of peaceful gatherings are advised to use court procedure to complaint against any rulings by courts of first instance on limiting the right to peaceful gatherings, and also against illegal actions of law enforcement bodies. The Institute «Republic» and the Ukrainian Helsinki Union on Human Rights give these cases priority for providing legal assistance where such violations occur	Not implemented.
FREEDOM OF ASSOCIATION	
1. Adopt a new law «On non-commercial organizations» which defines clear and standardized conditions for the creation or termination of activity of all types of non-profit making organizations, including organizations, whose creation is not allowed for by Ukrainian legislation, enabling them also to receive the appropriate tax incentives through having the status of a non-profit making organization:	Not implemented. During the year the Ministry of Justice and representatives of the public continued drawing up a low on civic organizations which to some degree complied with international standards. The process is underway of agreeing this document with ministries and departments
– simplify the procedure for registration of non-governmental organizations by creating one procedure for both non-profit making organizations and businesses, and to abolish the double registration of non-profit making organizations by two government structures	In the draft law
– abolish the territorial division of non-profit making organizations' activity and the restriction of their activity to the administrative-territorial unit they are registered in.	In the draft law
– abolish the strict division between associations created for their own members and those for others.	In the draft law

2. Abolish the practice of licensing social services which are provided by non-profit making organizations, and not from State or local budgets. Provide legislation stipulating the conditions under which the State pays for social services, and allowing for the provision of state assistance to nongovernmental non-profit making organizations.	Not implemented.
3. Stimulate charitable or other non-profit-making activity by providing tax incentives solely on condition that charitable or other socially significant activity is carried out, and not by virtue of having created a specific type of organization which may not even provide such services.	Not implemented.
4. Make the provision and use of State funding directed towards civic associations for carrying out State programmes more transparent	Not implemented.
5. Remove Article 186-5 from the Code of Administrative Offences, this presently imposing liability for the activity of unregistered civic organizations	Not implemented.
6. Sign and ratify the Convention on recognizing the legal identity of international non-governmental organizations (ETS № 124) that came into force on January 1, 1991.	Not implemented.
7. Strengthen mechanisms of cooperation and consultation between both government authorities and bodies of local self-government at all levels and civic associations on developing government policy in various areas, and also on their implementation and on creating normative acts.	This is being implemented, but too slowly and not often very effectively. The Public Council attached to one of the most important ministries, the Ministry of Justice, has not been functional for a number of years now. The positive work of the Public Councils attached to the Ministry of Internal Affairs, the Ministry for the Natural Environment and the Ministry of Defence are to be welcomed
ECONOMIC AND SOCIAL RIGHTS	
1. The fulfilment by the government and other parties engaged in social activity of their social functions should involve the following legal and economic mechanisms:	
а) Legal mechanisms should be ensured by drawing up and adopting a Social Code of Ukraine, ensuring however that it complies with the Budget, Family and Civil Codes.	Not implemented.
б) Economic mechanisms should stimulate the development of the country's economy, its social direction, the increase in people's income, first and foremost in their earnings. We need a radical reform of the system of work remuneration, restoration of the incentive function of wages, definition of the price of work, an increase in the proportion of wages in the general costs of production, in the gross national product and in the income of the population.	Not implemented.
2. Ukrainian legislation should be adapted to meet the requirements of the European Union, and most importantly, to guarantee levels of payments which conform with European standards.	Not implemented.
3. The European Social Charter should be ratified as a part of the guarantee of economic and social rights in Ukraine, this making it possible to raise the protection of these rights to a higher level.	Implemented.
4. A contemporary system of social security and social insurance must be created since stable growth in the standard of living and social harmony will be possible only if systematic changes are made.	Not implemented.

5. The allocation of most types of assistance needs to be linked to the family's level of income. The actual mechanism for receiving social assistance also needs to be regulated. The first step towards this would be introducing a single application to receive any forms of assistance. It is of primary importance to generalize and make accessible for employees of social protection agencies information about the status and real income of applications. To this end it would be necessary to use not only figures from the Ministry of Labour, but also data from the State Tax Administration, bodies of the Ministry of Justice and of Internal Affairs, and insurance funds.	Not implemented.
6. A system accommodating funding for health care from many different sources, with elements of both public and private financing, needs to be developed. Mechanisms for financing need to be explained clearly to the public, so that all concerned understand the possible conditions of payment. Distribution of responsibility and powers according to this scheme would be as follows: society must ensure acceptable subsidizing of necessary medical assistance to those who need it, doctors must within acceptable boundaries take part in providing such subsidized care, and the government must manage this activity.	Not implemented.
7. An effective system of loans to cover studies in higher education institutions should be created.	Not implemented.
8. The system for finding work for students of State-owned higher education institutions after their graduation should be improved	Not implemented.
9. The independence of higher education institutions should be broadened, and self-government developed.	Not implemented, although work is continuing, with a draft law under consideration in the Verkhovna Rada with specifically these aims.
10. Difficult issues regarding accreditation and certification of non-state educational institutions need to be resolved.	Not implemented, however work has begun on ordering the situation with non-state educational institutions
11. The system of vocational and technical education as one of the key factors in the development of Ukraine's economic is also in need of improvement.	Not implemented.
12. A system should be created for monitoring the quality of education, the mechanisms of public control over resources allocated to educational institutions at the level of local budges, mechanisms for bringing the education system into line with modern needs of the labour market, as well as creating transparent and effective system of incentives for educational workers through encouraging their professional development	Not implemented.
PROPERTY RIGHTS	
1. In order to ensure the effective defence of various forms of property rights, the range of objects which are protected by the right of ownership needs to be extended.	Not implemented
2. The functioning of the Ukrainian State Bailiffs' Service needs to be made more efficient to ensure the proper enforcement of court rulings. A System of private bailiffs should be introduced in Ukraine.	Not implemented
3. Discriminatory norms differentiating between the right of ownership of individuals and of legal entities need to be removed, in particular, through the gradual abolition of the Economic Code or by bringing its norms into line with those of the Civil Code, as well as by introducing amendments to the Law «On the introduction of a moratorium on the compulsory sale of property», and by imposing a ban on retrospective amendments to norms on taxation, etc.	Not implemented

4. To provide safeguards of the right of ownership, legal shortcomings in regulation of nationalization and privatization of property need to be rectified	Not implemented.
5. Inadequacies in corporate legislation must also be addressed, including by means of passing the Law of Ukraine «On joint stock companies».	Not implemented.
6. Tax legislation must be changed or substantially improved with the aim of ensuring equity and defence of all forms of ownership rights	Not implemented.
7. Effective defence of the right to all forms of ownership must be secured, in particular, via norms of civil, administrative and criminal legislation	Not implemented, moreover in 2006 property rights became even less protected, including as a result of ever increasing corporate raiding.
FREEDOM OF MOVEMENT AND FREEDOM TO CHOOSE ONE'S PLACE OF RESIDENCE	
1. Complete an automated record system of registration of citizens, using the best models applied in other countries and observing international standards for safeguarding human rights	Not implemented.
2. Guarantee protection of personal data related to registration and movement of individuals; in order to ensure confidentiality of movements and to eliminate the possibility of illegal surveillance over the movements of an individual. This applies in particular to the database of Ukrainian Railways on those buying travel documents (tickets) for the railways, with the access to this database not regulated by legislation	Not implemented.
3. In compliance with the Opinion of the Parliamentary Assembly of the Council of Europe (№ 190) on the entry of Ukraine to the Council of Europe, powers of registration of citizens, foreign nationals and stateless individuals should be passed to the Ministry of Justice of Ukraine	Not implemented.
4. Conclude the process of reform of legislation as regards registration, taking into account positive international experience and the Law of Ukraine «On freedom of movement and freedom to choose one's place of residence»	Not implemented.
5. It would be expedient to consider broadening the grounds for registration, and also to review legislation in order to eliminate the situation where exercise of ones rights depends on ones place of registration. The procedure for cancelling registration in private flats should also be simplified, and the inter-dependence of the fact of registration with the right to the given flat in the state and communal accommodation funds should be eliminated	Not implemented.
6. The procedure for issuing sailors' identification documents should be improved, taking into account the provisions of the Constitution of Ukraine on freedom of movement and clearly defined grounds for limiting trips abroad.	Not implemented.
7. Abolish the practice of restricting travel abroad for people having access to State secrets	Not implemented.
8. Throughout 2006 pass all normative acts envisaged by the Law of Ukraine «On the basic principles of social protection for homeless citizens and abandoned children» in order to enable its proper implementation. This particularly concerns certain Provisions «On a centre for registering citizens without a fixed place of residence», «On night shelters», «On rehabilitation centres», as well as a staff timetable and staff instructions for such institutions of social protection. Expenditure for their financing should be added as a separate item in the State Budget.	Implemented.

ENVIRONMENTAL RIGHTS	
1. Increase the control functions of government bodies in the area of protection of the environment, including significantly increasing the level of administrative liability for offences in the area of environmental protection. Support environmental safety.	Not implemented
2. Prepare institutional and organizational mechanisms for involving members of the public in decision-making on environmental matters both at the level of government structures, and of bodies of local self-government, and the broadening of positive experience.	Not implemented
3. Ensure that members of the public are informed on a broad and systematic basic about the state of the environment, about the activities of government structures and bodies of local self-government, and about decision-making which will have an impact on the environment.	Not implemented
4. Make it mandatory to publicly announce Statements on the potential environmental impact of activities in advance of environmental expert studies, to involve the public and to take public opinion into consideration in the conclusion of environmental expert studies, and to make it impossible to refuse access to EIA [Environmental Impact Assessement] materials and other documentation submitted for the environmental expert study.	Not implemented
THE RIGHTS OF THE CHILD	
1. A system should be created of specialized courts (juvenile justice). This will help improve the practical efficacy of the procedure for protecting the rights of the child, as well as the liability for the non-observance of these rights by those with responsibility	Not implemented.
2. Normative acts regarding the prohibition of corporal (physical) punishment should be made to work, and need to be accompanied by broad-ranging educational and information measures, training courses among professional groups working with children or in their interest, parents or those replacing them	This is partially being implemented, largely on the initiative of civic organizations and representatives of international intergovernmental structures
3. Changes are needed in procedure for criminal investigation and court proceedings. The child should communicate with those running the investigation via a psychologist in a safe environment. The conditions should minimize the degree to which the child takes direct part in court proceedings or the investigation. To achieve this, it is important to use audio and video recordings, a «Venetian mirror» during questioning to avoid having to repeat testimony many times.	Not implemented.
4. Rehabilitation and treatment programs for victims of violence, as well as the offenders themselves, should be developed or improved, and implemented. Any suspended sentences passed down should be directly contingent upon the offender's participation in treatment	Not implemented.
5. The resolution of situations of conflict and methods of upbringing in educational institutions must comply with standards for observing the rights of the child.	Not implemented. Implementation of the recommendations is possible on condition that a system is created for training educational workers on human rights and children's rights standards. At present, however, these are not covered in the training and professional development system It should be noted that what is needed is the actual creation of a training system which allows for the initial training of specialists to in fact teach these courses, as well as preparation of methodological material and so forth

6. «Status» punishments, that is, those where minors can be punished for acts which an adult would not be held legally liable for and would not therefore face punishment for, should not exist either at the level of legislatively imposed norms, or in the practice of preventive upbringing measures	Not implemented. The issue of «status» punishments had not previously been addressed in Ukraine and it requires extra study. However there is some evidence at least of «status» treatment with regard to minor in present approaches, for example in preventive upbringing.
7. Children able to understand their circumstances need to be guaranteed access to information concerning them in school, children's homes, at the doctor, or in the case of court proceedings.	Not implemented.
8. More attention needs to be paid to teaching children about human rights and the rights of the child. Human rights education is an important component of civic education. Programs need to be developed for children of different ages, textbooks should be written and there needs to be the possibility of choice.	This is partially being implemented, largely on the initiative of civic organizations and representatives of international intergovernmental structures There is no adequate government programme with appropriate funding
9. Representatives of professional groups working with children or in their interest should have special training on the rights of the child	Not implemented.
10. The private life of children in educational, health care or other institutions must be protected. The staff of these institutions should respect the privacy of students, children in care and young patients, especially where they are living in group conditions.	Not implemented. This issue has thus far not received any attention from the government. There is no relevant system for training or retraining personnel of children's institutions
11. All children must have equal possibilities for gaining general secondary education. Equality of educational chances should begin with pre-school education.	Not implemented. Children from rural areas, for example, have less chance of getting pre-school education than children living in urban areas.
12. The state should pay particular attention to ensuring access to education for children with impaired possibilities, with the maximum level of socialization for these children within general education schools, and should provide individual tuition for those children needing it	This is partially being implemented, largely on the initiative of civic organizations and representatives of international intergovernmental structures There is no adequate government programme with appropriate funding.
13. Children in hospitals and similar should have the opportunity to continue their education if their state of health allows.	Not implemented.
14. Proper financing needs to be provided for educational institutions, with payment of salaries for educational staff and provision of the necessary materials in schools.	Not implemented.
15. The public authorities should develop and introduce a separate program for children who have dropped out of school and do not wish to continue their studies	Not implemented.
16. Discrepancies in the laws on orphaned children need to be eliminated, specifically	
– According to the Law «On ensuring the organizational and legal conditions for the social protection of orphaned children and children deprived of parental care» from 13 January 2005, the right to full State support in educational institutions is guaranteed to orphaned children and children deprived of parental care up to the age of 18, and to those children in this group if continuing their education, to the age of 23. The end of this provision is linked with completion of studies (not age). At the same time, in accordance with the Order of the Ministry of Education and Science and the Ministry on Family, Children and Youth «On approving Provisions on children's homes and general education school-orphanages for orphaned children and children deprived of parental care» from 21 September 2004, the said children remain in general education school-orphanages until they finish their basic or full general secondary education, or where necessary until they come of age (reach 18). It is thus not clearly established up to what age young people can remain in such institutions.	Not implemented

– A child's documents only set down the person who is responsible for keeping any property remaining after the death of the parents. Those responsible for maintaining any other property are not indicated.	Not implemented.
– In accordance with the Law «On ensuring the organizational and legal conditions for the social protection of orphaned children and children deprived of parental care» from 13 January 2005 the main function with regard to protecting a child's property rights and interests is vested in bodies under the jurisdiction of the Ministry on Family, Children and Youth, while according to the «Rules of care and guardianship» from 26 May 1999 – in bodies under the Ministry of Education and Science.	Not implemented.
– According to the Family Code from 10 January 2002 and the Law «On ensuring the organizational and legal conditions for the social protection of orphaned children and children deprived of parental care» from 13 January 2005, the child retains the right of use to the accommodation in which he or she lived before being placed in a school-orphanage. That is, the child is entitled to the accommodation either on the basic of collective ownership, or as private owner. In addition, according to the Law «On protection of childhood» from 26 April 2001, the premises are retained in the children's name for the entire period during which they are in State care, regardless of whether the property where the children have come from is now lived in by other members of the family. At the same time, the Housing Code states that living premises are retained for the children if there are other members of the family living in the house or flat (or part of such). There is thus a contradiction, since it is not set down whether there must be somebody from the family of the child living in the accommodation to ensure that the property is retained in the child's name.	Not implemented.
– The Law ««On ensuring the organizational and legal conditions for the social protection of orphaned children and children deprived of parental care» states that the child is provided with housing «in the event of his or her lack of right to housing», this being an incorrect formulation since, according to the Constitution (Article 47) all citizens of Ukraine have the right to housing. One may lack housing, but not the right to it.	Not implemented.
– According to the Civil Code a person from the age of 14 to 18 is considered to be a minor, while under the «Rules of care and guardianship» – from 15 to 18	Not implemented.
17. There is an urgent need for a reform to the system of care in Ukraine and such reform needs to take place at a pace which is as intensive as is feasible. However this process must be phased and professional. Broad public discussion of the reform is needed at the stage of formulating a plan of possible changes, with the use of the experience already gained by nongovernmental organizations which are working in this area.	Not implemented.
18. The state must create conditions for early identification of «crisis» families in order to organize timely social backup. A significant number of children could remain in the family environment if such families received more financial and psychological support	Not implemented.
19. The training of foster parents needs to be compulsory and take place at a professional level. The responsible state authorities should develop programs for such training. During the process of preparation of such programs, experts from nongovernmental organizations should be consulted in order to organize a comprehensive process of preparation and to base the process on principles of the rights of the child.	This is partially being implemented.

THE RIGHTS OF REFUGEES AND ASYLUM SEEKERS	
1. Create departments of the migration service in each region of Ukraine	Implemented
2. Provide 24-hour duty of employees of the civil state migration service at all international control points on Ukraine's State border. Set up special premises where migration officers can interview potential asylum seekers.	Not implemented
3. Hold an independent legal audit of the system of extradition and deportation from the territory of Ukraine, especially to countries which are not members of the Council of Europe	Not implemented
4. Put an immediate stop to the illegal discriminatory practice of avoiding granting refugee status to asylum seekers from certain countries (primarily CIS countries); Hold officers of the migration service answerable for such action.	Not implemented
5. Immediately stop the practice of deporting / extraditing people seeking asylum before all appeal procedure has been completed	Not implemented
6. Ensure that government structures are provided with qualified interpreters and lawyers to safeguard the rights of asylum seekers during the asylum procedure	Not implemented
7. Introduce a single form of identity papers for people during the asylum procedure instead of the four documents which are presently used.	Not implemented
8. Improve the system for asylum seekers to receive identification codes and work permits.	Not implemented
9. Iincrease the number of accommodation centres for asylum seekers and refugees, to legislatively foresee the possibility of sending asylum seekers there from when they submit applications for refugee status;	Not implemented
10. Organize training in the basic principles of migration law for lawyers of administrative courts, including at least three judges of each district administration court and five judges of each appeal administrative court.	Not implemented
11. At the legislative level to introduce additional forms of protection in Ukraine for people forced to leave their country of origin or of permanent residence (humanitarian protection, temporary protection)	Not implemented
12. Pass a Law «On asylum»	Not implemented
13. Define in legislation the authorities of the State migration service (in order to shorten the period of review of applications migration service agencies at the local level should be given the authority to take final decisions on applications for refugee status).	Not implemented
14. Create a system of immigration tribunals (specialized bodies with court power) independent of State executive bodies	Not implemented
15. Eliminate discrepancies in Ukrainian legislation which impede the exercise of the rights of refugees in accordance with Ukraine's international commitments and according to international law	Not implemented
16. Implement measures aimed at helping refugees adapt into Ukrainian society; provide information support for refugees with regard to ensuring their rights according to Ukrainian legislation; explain refugees' rights and the mechanisms for ensuring them to state officials whose duties include providing for these rights; to help refugees learn Ukrainian and resolve problems related to finding work	Not implemented

17. Improve training of immigration specialists. To introduce compulsory courses on the rights of refugees for all employees of law enforcement bodies and border guard officers. To begin specially designed training or retraining of immigration specialists in the system of state higher education.	Not implemented
PRISONERS' RIGHTS	
1. Fulfil Ukraine's commitment to the Council of Europe and finalize the transfer of the Department to the Ministry of Justice as called for in PACE Resolution № 1466 (2005)	Not implemented
2. Change priorities in law creating activities, giving preference to humanitarian values over issues of the technical functioning of the Department; increase attention to issues relation to the observance of human rights, respect for the human dignity both of people imprisoned, and personnel of the penal institutions, and not just confine oneself to declarations on this subject	Not implemented
3. Introduce monitoring of prisoners' conditions on a wide scale, and prepare annual reports on the state of affairs in the system by nongovernmental organizations, including on the basis of state funding, as well as the preparation of alternative reports, reports on problems or on areas of activity of the institutions	Not implemented
4. Qualitatively increase information to society about the situation and problems of the system via regularly carrying out a wide range of measures such as press conferences, roundtables, as well as simplifying the procedure for providing access of members of the public and journalists to penal institutions.	Not implemented. On the contrary, an Order was passed by the Head of the Department for the Execution of Sentences according to which access by members of the public and journalists is only once a week at weekends, by prior arrangement with the penal administration
5. Pay more attention to social protection for staff of penal institutions; to provide professional development, and involve the efforts which nongovernmental organizations can offer in resolving these issues.	Not implemented
6. Facilitate the undertaking of a comprehensive analysis of the norms of the Penal Code and normative acts of the Department, as well as practice in implementing them, to contribute to their improvement and to involve specialists in this work, including the Penitentiary Association of Ukraine.	Not implemented
7. Promote the introduction of public supervisory control over penal institutions, and not limit this to the activities of supervisory commissions.	Not implemented
8. Pass a Strategy for reforming the penal system only after independent expert opinions, and public debate.	Not implemented
THE RIGHTS OF PRISONERS WITH TUBERCULOSIS	
1. Improve the conditions of prisoners with tuberculosis by:	Not implemented
– ensuring that patients are placed in wards for not more than 8 people;	
– providing adequate lighting in the wards;	
– ensuring an appropriate temperature in the wards;	
– providing the patients with regular cold and hot water;	
– increasing the number of washbasins in the wards;	
– carrying out reconstruction work on the toilets;	
– establishing shower rooms in each block of the medical unit and creating proper conditions in them.	
2. Improve the provision of food to patients by:	Not implemented
– restructuring the canteens;	
– providing enough lighting in the canteens;	

– ensuring that the meals for patients are prepared by hired staff – a cook, so that the food is fit to eat.	
3. Improve the effectiveness of treatment by:	Not implemented
– ensuring that the patients receive specific medication against tuberculosis, including medicines of the «new generation» in the necessary amount	
– providing patients with medicines for stimulating the immune system and generally strengthening health	
4. Draw up and introduce amendments to electoral legislation which ensures that the right of prisoners to free and fair elections is exercised, and which prevents the administration exerting influence over the expression of voters' will.	Not implemented
5. Ensure access by representatives of human rights organizations to penal institutions, and to draw up and pass the relevant law to this effect.	Not implemented
6. Ensure the observance of the right of prisoners to make appeals to the authorities and to bodies of local self-government, and their right to education.	Not implemented
THE RIGHTS OF PEOPLE WITH IMPAIRED PHYSICAL POSSIBILITIES	
1. Work towards developing a positive opinion and attitude towards people with disabilities within the community.	Not implemented
2. Promote more active work from existing state and public services with a social direction, as well as openness and transparency in their activities	Not implemented
3. Ensure that «disability pensions» are not viewed as the main means of existence for people with disabilities. People with all types of disabilities, and all categories of disability status regardless of their pension entitlements, should have the opportunity to work and to find self-fulfilment in society. The system of pensions should be significantly simplified and should not depend on a law being passed on the State budget.	Not implemented
4. Create and give comprehensive support to civic organizations and voluntary services.	Not implemented
5. Create barrier free access.	Not implemented
6. Introduce amendments to legislative acts which regulate the designation of disability status. The designation should be made on the basis of the state of health and the physical or mental impairment, and not on the level of adaptation or difficulties in adaptation of the given person, and should be designated in many cases for life or at least for many years, and not be reviewed every year.	Not implemented
7. Gradually change the direction of special education from institution-based to studying where one lives through classes attached or fully integrated into educational institutions at all levels	Not implemented
8. Encourage the mass media to produce their publications and broadcasts taking into consideration people with vision or sight impairments.	Not implemented
9. Establish by law positions of social worker – lawyer or official representative as an effective means of protecting people declared unable to look after themselves who have been assigned a guardian or carer.	Not implemented
10. Base the work of public authorites and local authorities on providing for the needs and observing the rights of people with disabilities on the principle: «Don't do things for us without us». There should be more active involvement of people with disabilities in resolving their own problems at all levels of power.	Not implemented

OBSERVANCE OF THE RIGHTS OF PEOPLE LIVING WITH HIV OR AIDS, AND MEASURES TO AVERT AN EPIDEMIC	
1. Measures should be taken to remove the contradictions which lead to an unwarrantedly severe approach to the issue of the actual use of illicit drugs by people suffering from drug addiction. While in legislative terms this is not defined as a criminal act, in practice, people face prosecution for actions which are objectively linked, such as obtaining or possessing for personal use small amounts of narcotic substances.	Not implemented
2. The strategy of harm reduction for users of narcotics, which is an international method that has recommended itself and proved highly effective, needs to be made widely.	Not implemented
3. The emphasis should be moved from the present ineffective fight against drug addicts who are, according to the approach adopted by the European Union, victims of organized drug crime, to the fight with the real culprit of the rising level of drug abuse in Ukrainian society – namely organized drug crime.	Not implemented
4. It would be expedient to undertake immediate measures aimed at fighting corruption in the law enforcement bodies, in particular those within the system of the Ministry of Internal Affairs, which contributes to the increasing level of drug abuse in Ukrainian society and flagrant violations of the rights of drug addicts.	Not implemented
5. An effective model should be created aimed at educating the upcoming generation (children and young people) with a focus on a healthy way of living which ensures maximum opportunities for their physical, cultural and spiritual development, and affirms universally accepted values, the fostering of creative possibilities, since the existing system for bringing up young people has little effect and does not resolve the issues which they face.	Not implemented
6. A healthy style of life should be declared a State priority, with support being provided by the government.	Not implemented
7. A broad complex of educational and information measures about drug addiction and HIV/AIDS, and the problems connected with them, should be implemented	Not implemented
8. Pass a Law on introducing amendments to Paragraph 1 of Article 309 of the Criminal Code of Ukraine which would remove from this Article the sanction in the form of deprivation of liberty, replacing it by a punishment involving participation in socially useful work on the basis of social rehabilitation centres; it would also supplement Paragraph 2 of Article 309 with an alternative sanction envisaging the involvement of those guilty of the acts referred to in the article in alternative liability in the form of socially useful work on the basis of social rehabilitation centres for a period longer than that envisaged by Paragraph 1 of Article 309, with the obligation to voluntarily undergo a medical rehabilitation course against drug addiction, defining drug addicts as those for whom such an alternative sanction would largely be applied.	Not implemented
9. Gradually change the system for assessing the effectiveness of the activities of police agencies. At the first stage to exclude from the effectiveness showings of the activities of police agencies in the area of fighting the illegal circulation of drugs such indicators as the launching of criminal cases under Article 309 of the Criminal Code (for illegal actions relating to drugs but not for the purpose of selling them). At the second stage – to draw up and implement a system which meets modern demands	Not implemented

10. Move the focus towards uncovering crimes related to the circulation of drugs, in particular, those connected with their illegal transportation onto the territory of the state, their production and preparation in order to sell them, and also crimes of involving minors in drug abuse. We would thus achieve a transfer of the efforts of police agencies towards fighting organized drug crime which is directly responsible for the increased drug abuse in Ukrainian society, and not fighting ordinary illicit drug users.	Not implemented
11. Introduce amendments in the table of small, large and particularly large amounts of narcotic drugs, psychotropic substances and precursors in illegal circulation, approved by Order No. 188 of the Ministry of Health of Ukraine from 01.08.2000, as regards defining where the borders lie, in particular of doses for personal use by drug addicts, with this being determined by a competent drug abuse commission.	Not implemented
12. Introduce a comprehensive system of medical and social assistance for those suffering from drug addiction which would unite programs for detoxification, rehabilitation, substitution therapy, psychological and social reintegration.	Not implemented
13. Ensure that drug addicts are informed as to the presence and available of medical and social services, the provision of services to injecting drug users and people living with HIV/AIDS for protecting their rights and legitimate interests, establishing precedents in bringing those responsible for violating the rights of injecting drug users and people living with HIV/AIDS to answer	Not implemented

A SHORT ANALYSIS OF THE WORK OF THE HUMAN RIGHTS OMBUDSPERSON[1]

The office of the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine (hereafter the Human Rights Ombudsperson) is the only government institution in Ukraine created to defend human rights and fundamental freedoms The Human Rights Ombudsperson is empowered to exercise parliamentary control over the observance of these constitutional rights and liberties. The relevant law, passed in December 1997, was based on the model of what they call a «weak» Ombudsperson who does not consider the kind of appeals which are reviewed by courts, and terminates consideration already commenced if the party involved lodges a civil law suit, application or complaint with the court. The law envisages a fairly wide mandate for the Human Rights Ombudsperson who has the right to receive any information, including that which is classified and see any documents; to visit unimpeded any state institutions or bodies of local self-government, enterprises and organizations, including any «closed» institutions, and to question any individuals held there; to be present at sessions of any state authorities, courts at all levels; to ask to see officials and civil servants in order to receive explanations, to demand from them assistance in checking the activities of institutions, enterprises and organizations under their control; to approach the court with an appeal defending human rights and freedoms; to inspect the situation with observance of human rights and freedoms by state bodies including those carrying out investigative operations. All structures approached by the Human Rights Ombudsperson are bound to cooperate and provide all necessary assistance, in particular by ensuring access to all documents and other materials, by providing information and also giving explanations as to the actual, and the legal grounds for their actions and decisions. Interference by any public authorities or bodies of local self-government in the activity of the Ombudsperson is prohibited, and the latter is not obliged to give any explanations with regard to the substance of any cases either presently being investigated or upon their completion. Having completed examination of a complaint, the Ombudsperson sends a submission to the relevant body on eliminating the violations of rights and freedoms identified, this requiring enforcement within a month. In fact, however, the law stipulates no liability for violations of the Ombudsperson's mandate or for failure to comply with his/her submission.

This institution for the defence of human rights, previously unknown in Ukraine, is thus based on the high moral standing of the Ombudsperson whose decisions and suggestions should be heeded by the authorities and the public. However, since in Ukraine neither the authorities nor society have too much respect for human rights, the Ombudsperson's job was not always easy. Having begun without any financing and without premises, the Secretariat of the Ombudsperson was immediately inundated with vast numbers of complaints all of which it was in fact simply impossible to cope with. However, being concerned and extremely energetic, Nina Karpachova gradually achieved notable success. This is evidenced, for example, by the enormous different between the first and second annual reports. If the first was to a large extent of an academic nature, the second was the report of an active and productive human rights institution. It was largely a case of «putting out fires». Maybe at that time this was the only possibility for protecting people in the country, by

[1] By Yevhen Zakharov, Co-Chair of KHPG and Head of the UHHRU Board.

bringing specific cases to conclusion. It was extremely difficult then to build a system for human rights protection at that time.

From 1999 – 2003 Karpachova took an active role in a number of high-profile cases, often against the wishes of the highest echelons of power. Flaccid legislation notwithstanding, she was able to force government bodies to reckon with her opinion and her assessments. She intervened in some instances of heated conflict, such as those around the events of 9 March 2001[2], and pointed to violations of human rights whatever the political circumstances. When the first 5-year tenure ended, her election to a second term in May 2003 was by no means straightforward since the Presidential circles wanted to see a more amenable and malleable person in that position. However there were virtually none willing to take on an extremely difficult job. Human rights organizations, believing that there was no better candidate for the position, actually sent many appeals to parliament calling on the latter to elect her again. As a result she began z new term in office.

From spring 2004, the views of the Ombudsperson and of the majority of human rights organizations regarding the political processes in the country began to diverge, and in some issues became even diametrically opposed. For example, in her third report (in July 2005), Karpachova claimed that there had been no change for the better as regards freedom of speech and that there were numerous cases of political repression. It would be difficult to agree with such an assessment. It gradually became ever more evident that Nina Karpachova had adopted the position of the Party of the Regions, losing therefore impartiality and independence, and that she was increasingly involved in promoting her own image. This could be seen during the Presidential campaign of 2004. Her voice was not heard when hundreds of young people from «Pora» were unlawfully detained. It became clear to all when she took part in the 2006 elections.

In our view, the prohibition stipulated in the Law on the Human Rights Ombudsperson against holding representative office means that the Ombudsperson has no legal right to take any steps aimed at being elected to such office in the immediate future. After all, participating in the elections as a candidate for the office of National Deputy is a nationwide statement of overt political preferences and party leanings. One should also note that Nina Karpachova effectively held second place on the candidate list, following only the leader of the party. This demonstrates that the image, authority and power of the position of the Ukrainian Human Rights Ombudsperson were deliberately used to serve the interests of one specific political force. Moreover, if the objective, as indicated in the law, of holding office is clearly unlawful, then specific and conscious steps taken to achieve this objective must also be deemed unlawful. Otherwise we would have to acknowledge effective permission to engage in open speculation on legislative norms, to abuse formal law in a way quite transparent to the general public, and to show disregard for the legislative guarantees of the Human Rights Ombudsperson's impartiality. Regrettably Nina Karpachova resorted to overt (and, according to some human rights colleagues, cynical) abuse of the law during the parliamentary election campaign...

Later, having been elected to parliament, Nina Karpachova did not herself resign from office as Human Rights Ombudsperson, thus infringing the Law on the Human Rights Ombudsperson which expressly prohibits combining this office with any representative mandate. «The Human Rights Ombudsperson may not hold a representative's mandate or occupy any other paid or unpaid office in government bodies» (Article 8 § 1).

The Law also states (in the same Article) that the Ombudsperson «may not be a member of any political party». This effectively means that the Ombudsperson must be apolitical, with his or her candidacy being agreed by both the ruling party or coalition, and the opposition. In other countries, the Human Rights Ombudsperson is usually elected by a qualified, rather than a simple, majority. In the case of Ukraine, this office has become extremely politicized.

Of major importance is the Ombudsperson's right to make submissions to the Constitutional Court since members of the public may not themselves approach the Court. However Nina Karpa-

[2] 9 March 2001 was the last day of confrontation between the mostly young activists of the organization «Ukraine without Kuchma». Around a thousand activists were detained and/or beaten up by law enforcement officers, many targeted at stations, bus stops when heard speaking Ukrainian. The protest movement suffered a serious setback.

chova has only made four submissions during her entire period in office, although in our view the need for these was considerably greater. The Ombudsperson should, first, have asked the Constitutional Court to provide an interpretation of social and economic rights to prevent them appearing like purely Soviet guile. For example, what is meant by «a standard of living sufficient for himself or herself» and does the minimum subsistence level ensure such a «sufficient level». Secondly, the Ombudsperson was simply obliged, I believe, to ask the Constitutional Court to assess the new procedure for allocating pensions, to determine whether or not they discriminate on age or other grounds. A third submission would be in defence of the right to information, putting forward a question about the unlawful restrictions to access which are in breach of the Constitution. This list of possible submissions the Human Rights Ombudsperson could make to the Constitutional Court could go on and on.

The Ombudsperson's level of communication with the public also leaves a great deal to be desired. By law the Ombudsperson must provide an annual general report on the human rights situation in the country, and there may also be special reports. However in almost nine years there have been a total of only three general reports – in 2000, 2002 and 2005, as well as on special report on the rights of Ukrainians working abroad. There have only been five Bulletins of the Human Rights Ombudsperson. All of them contain either international agreements or submissions and letters from the Ombudsperson, or her speeches, and contain a lot of photographs of Karpachova herself. The Ombudsperson's website is not updated very often, 5 or 6 times a months, and is not, in our view, particularly informative. You can find the reports, bulletins, press releases, regulations about the Secretariat of the Human Rights Ombudsperson and its representatives, You cannot, however, get answers to questions regarding the Secretariat's structure and its staff; how many appeals have been received, what kinds of violations people are complaining of, which government bodies are involved; a social portrait of the people making the complaints; how many complaints have been resolved by the Secretariat and how many were sent for review to other government bodies, and about the success rate on resolving the problems people have approached the Ombudsperson with. There is no such information on the site, and there is also virtually no information about the Secretariat's budget and how it is spent. There is only some similar information for 2005, but very short on substance and giving little idea about the work of the Ombudsperson. The Secretariat does not provide substantive answers to formal information requests asking about the Ombudsperson's activities deeming these to constitute interference. This is despite the fact that the Law «On information» clearly applies to the Human Rights Ombudsperson.

It is thus difficult to assess how effective the Ombudsperson's .work is. In the Government's responses to questions posed by the UN Committee against Torture regarding Ukraine's Fifth Periodic Report on its implementation of the UN Convention against Torture, it is asserted that over the period that the office of Human Rights Ombudsperson has existed in Ukraine, more than 712 thousand Ukrainian citizens, foreign nationals and stateless persons have turned to it with appeals falling within the Ombudsperson's competence, with investigations into violations of rights and freedoms being initiated in 35 percent of these cases. Apparently, as a result of the investigation each third violation was eliminated. These figures would seem improbable if one simply compares them with the number of working hours of the staff of the Secretariat. The question arises why such information is sent to the UN but is not communicated to the Ukrainian public?

Some actions of those in the Secretariat suggest a total lack of understanding of human rights issues. For example, complaints from prisoners alleging unlawful behaviour by the staff of penal institutions are constantly sent to the State Department for the Execution of Sentences for «measures to be taken». Secretariat staff should at very least ensure minimum guarantees of safety of those making complaints, and specifically confidentiality of information received. Principle 33 (3) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: «Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant». The prisoners who send complaints to the Ombudsperson alleging unlawful treatment clearly do not expect their complaints to be passed to precisely those people the complaints refer to. Such treacherous behaviour is absolutely unacceptable. We would note that the UN Committee against Torture drew attention to the question of ensuring confidentiality in their

Conclusions and Recommendations with respect to Ukraine's Fifth Periodic Report on its implementation of the UN Convention against Torture. It stated[3]:

The State party should ensure that the Ukrainian Parliament Commissioner for Human Rights functions effectively as an independent national human rights institution, in accordance with the Paris Principles, and with independence from political activities, as specified in the «Law on the Ukrainian Parliament Commissioner for Human Rights» of 1997.

The State party should provide the Committee with detailed information on independence, mandate, resources, procedures and effective results of the Ukrainian Parliament Commissioner for Human Rights and ensure that the complaints received by the institution remain confidential so that complainants are not subjected to any reprisals.

The Law on the Human Rights Ombudsperson envisages the option of the Ombudsperson appointing representatives. It would be desirable to have such representatives in each of the 27 regions of the country since the central office in Kyiv is simply not able to deal with the large influx of appeals received. Karpachova has not, however, done this, claiming lack of funds. In 2006 the Secretariat's budget was nearly 20 million UAH which is no small sum for an office with 120 members of staff. The appointment of regional representatives would strengthen control over the human rights situation at local level. As well as delegating powers to regional representatives, it would also be expedient to have representatives with specific focus, by creating the positions of three specialized Ombudspersons – on the rights of the child, on minority rights and freedom of information and protection of personal data. These specialized Ombudspersons could head the relevant departments in the Secretariat however an important prerequisite for their work would be their procedural independence. Yet this has not been done either. As Ombudsperson on the rights of the child Karpachova represented two children which elicited from experts only ironic smiles.

In our opinion, following the Orange Revolution there were a real opportunity to create a State system for the protection of human rights. The key elements of this would be: the creation of a network of regional representative offices, the delegating of powers at regional level and to specialized Ombudspersons; significant improvement in communication and the level of information on human rights issues; development of cooperation between a network of nongovernmental human rights organizations and the office of the Ombudsperson; particular attention to strategic litigations, including those which are likely to be successful in the European Court of Human Rights; as well as organizing cooperation with bar lawyers. These options have yet to be adopted.

What would be ways of improving the effectiveness of the Human Rights Ombudsperson? One would involve changes in the Law on the Human Rights Ombudsperson. Wishing to increase the Ombudsperson's mandate, Nina Karpachova, together with two colleagues from the Party of the Regions, Edward Pavlenko and Yury Myroshnychenko, tabled legislative initiatives. Draft Law № 2892 «On amendments and additions to the Civil Procedure Code of Ukraine» and № 2893 «On amendments to the Code of Administrative Justice» envisage giving the Human Rights Ombudsperson the status of independent party to civil and administrative proceedings. This would enable her/him to become the party to court proceedings at any time, even after the parties' debate. In our view this would constitute direct pressure on the court, and violates the principles of «equality of arms» in court proceedings, as well as the principle of independence of the judiciary. It would effectively be an attempt to give the Ombudsperson the functions of Prosecutor supervision which is unacceptable. Amendments to the Law on the Human Rights Ombudsperson should be based on two premises, firstly that the Ombudsperson cannot take on the powers of the government authorities, and secondly, the activities of the Ombudsperson must not influence the independence of the judiciary. On the other hand, since the judicial system has failings, it would be desirable to give the Ombudsperson the possibility of drawing attention to court rulings which she/he believes to infringe human rights. It would be a good idea to give the Ombudsperson the right to turn to the legally envisaged structures with a recommendation to check court rulings which had already come into effect if there was evidence that during the court procedure, there had been human rights violations which had had an impact on the ruling itself. It would also be appropriate to entitle the Ombudsperson to approach the court on her/his own initiative in cases where a normative act (or-

[3] CAT/C/UKR/CO/5, 18.05.2007, p.21

der, resolution, instruction) which infringes human rights needs to be revoked. As well as the rights already mentioned, it would also be expedient to entitle the Human Rights Ombudsperson:

– to initiate amendments to legislation in the interests of safeguarding human rights and fundamental freedoms;

– to issue formal warnings to public officials responsible for human rights infringements;

– to institute in the public authorities or bodies of local self-government the disciplinary procedure allowed for by labour legislation on officials responsible for human rights infringements;

– to make a submission to the public authorities or bodies of local self-government to dismiss individuals who have repeatedly or flagrantly violated human rights and fundamental freedoms;

– to inform the public via the mass media about human rights infringements by public officials, or cases where public officials have not responded appropriately to appeals from the Human Rights Ombudsperson.

Other serious resources which have yet to be made use of are creating regional representative offices of the Ombudsperson and working in cooperation with nongovernmental human rights organizations. In order to work efficiency with complaints sent to the Human Rights Ombudsperson, it would seem vital to have an electronic database. The development of an internal network within the structure would make it possible within the space of a few minutes to obtain information from any computer in the network about the content and stage of review of any complaint The system of communication with the public also needs improvement which could be achieved by daily updates of the website of the Human Rights Ombudsperson, regular publication of a bulletin describing and analyzing violations of human rights violations, and fundamental freedoms, television programmes on Ukrainian Television Channel 1 with direct contact between the Human Rights Ombudsperson and the viewers.

On 8 February 2007 parliament with 255 votes elected Nina Karpachova to a third term as their Authorised Human Rights Representative, i.e. Human Rights Ombudsperson. It turned out that civic society which had succeeded in having its candidate put forward in parliament was still not strong enough to force parliament to heed the will of a substantial part of Ukrainian society.

We wish Nina Karpachova every success in restoring her tarnished reputation. Her participation in political activities while at the same time holding office as Human Rights Ombudsperson seriously undermined the authority of the office in general and confidence in her. One cannot sit on two chairs simultaneously; political activities are incompatible with the vital role the Ombudsperson must play in defending human rights. A move is needed away from politics, and towards working quite differently from before. All the more so since public attention on the work of the Human Rights Ombudsperson has increased considerably since the last elections and this work is now under the close scrutiny of hundreds of human rights organizations.

THE SITUATION AND TRENDS IN UKRAINIAN CONSTITUTIONAL LEGISLATION IN 2006[1]

1. OVERVIEW

The development of constitutional legislation in 2006 and the first five months of 2007 should be seen as the practical implementation of the Ukrainian «constitutional reform» of 2004. It was in spring of last year that parliamentary elections were held for the first time according to the new electoral system. Independent observers found them to have been lawful, transparent and democratic, yet from the very outset the new composition of the Ukrainian parliament gave cause for serious thought.

For example, the results showed that more than half (approximately 250) of the deputies were residents of the capital Kyiv. This virtually immediately places in doubt the representative nature of the fifth term (post-2006) of the Verkhovna Rada. The outcome also demonstrated that the deputy corps is to a large extent made up of rich people – of powerful businesspeople who it is customary in Ukrainian publicist writing to call «oligarchs».

The highest level business elite therefore presented itself not merely as donors or the parties and blocs in the spring electoral race. Many of them, for example, R. Akhmetov, K. Zhevago, D. Zhvanya, O. Tretyakov and P. Poroshenko themselves became (or were re-elected) National Deputies. As a result, the separation of business and politics so dreamed of in theory and talked about by the Ukrainian media, failed to emerge. Quite the contrary: parliament very quickly split into a ruling coalition and a «non-ruling» opposition which at the same time were political representatives of the economic interests of the South and East, as well as of the centre and West of Ukraine.

Other problems of a structural nature arose during the formation of a coalition of deputy factions and their submission for approval of a candidate for the post of Prime Minister. At that time, however, the tension had not reached the level of political crisis. It seemed that the «Memorandum of National Unity», put forward by the President and signed by the main politicians in the country, had assuaged the ambitions both of the defeated and of the victors. The public, however, did not respond with any great enthusiasm to this document. At the political level it was sharply criticized by the leader of the opposition Yulia Tymoshenko.

Soon after the formation of the government, a majority in the Verkhovna Rada began ignoring the requirements of Article 83 of the Constitution regarding the procedure for forming coalitions of deputy factions. Isolated cases when individual National Deputies joined the coalition were replaced by the practice of mass filling of their ranks through individual or group membership. Although in the third term[2] of the Verkhovna Rada there were around 600 cases where Deputies changed factions, while in the fourth term there were 300 such cases, the exodus of National Deputies from the opposition factions on this occasion was taken quite badly. For example, the Ukrainian public condemned the lawful move of the socialists, headed by Oleksandr Moroz, to form a coalition with

[1] By Vsevolod Rechytsky, Constitutional Specialist for the Kharkiv Human Rights Protection Group.
[2] It is customary in Ukraine to distinguish between different parliamentary terms of the Verkhovna Rada by number. The fifth sklykannya or term was that which followed the 2006 elections. [translator]

the Party of the Regions and the Communists. When, later, A. Kinakh's faction joined the coalition, the Ukrainian media directly labelled this treachery and political defection.

Later, in his Decree of 2 April 2007 «On the early termination of the powers of the Verkhovna Rada of Ukraine» No. 264/2007 President Yushchenko stated that «infringements of the constitutional requirements for the formation of coalitions of deputy factions» had led to a distortion of the outcome of people's declaration of will in March 2006. Furthermore, the «unlimited» formation of the coalition was called disregard for citizens' electoral rights which had led to a direct threat to national sovereignty.

The development of events at the end of 2006 and the beginning of 2007 had thus, in the President's view, gradually become the precondition for usurpation of power in Ukraine. He considered that it jeopardized national security and had destabilized the situation in the country, presenting a potential threat to the very existence of the Ukrainian State. This was manifesting itself in the fact that an ever increasing number of deputies from the opposition had begun voting together with the ruling coalition. With the exception of the move to the coalition of the deputies of Anatoly Kinakh's group, and earlier – of Oleksandr Moroz's socialists, what was involved was not so much a formal move to the coalition, but a change in strategy of voting of isolated members of the opposition.

However the deviation from norms governing political ethics by some deputies did not in the given instance constitute a formal infringement of the Constitution. After all, Article 80 § 2 of the Constitution states that «National Deputies of Ukraine are not legally liable for the results of voting or for statements made in Parliament and in its bodies». The new supporters of the coalition sat in the same hall for plenary sessions as before, they listened, made decisions, voted. Everything was the same as before, only their political assessment had changed. Therefore, in Ukrainian political discourse the question began to be discussed of whether a faction has power over the views of its members. Still more, do the people of Ukraine have power over the mind and consciousness of their deputies?

However, be that as it may, the people elected very different individuals with all their inevitable inner specific features and qualities. The voting moreover was effectively on the basis of closed candidate lists. That means that the people when voting for deputies had to rely on the maturity of the political force which formed a specific list. In reality the lists were formed by the leaders of the blocs and parties (more or less to an equal extent by V. Yanukovych, V. Yushchenko and Y. Tymoshenko), it is they who bear the main responsibility for the improper behaviour of their chosen candidates. Yet in the later events it was the President and Yulia Tymoshenko who were first to condemn political defections.

Furthermore, analyzing the events in retrospect, one can see that some of the places on the candidate lists in 2006 were bought for money («donations»), which the electors clearly did not authorize the political leaders to do. Obviously in no electoral system in the world is the choice of people infallible. A normal electoral system can be majority, proportional or mixed, however in any of these cases it must produce a result where errors of the expression of people's will are isolated, that is, not creating an effect on a mass or systemic scale. The situation with the newly-elected parliament gave grounds for speaking not of political apostasy, but of a faulty manner of forming electoral candidate lists, a legally imperfect electoral law.

On the other hand, there are no serious documented grounds for asserting that the people as represented *by the majority of voters* condemned the move of deputies from the opposition to the coalition. The people, in fact, elected National Deputies not directly to the coalition or the opposition, but to parliament – the Verkhovna Rada of Ukraine. Their choice does not directly influence whether a Deputy joins the coalition or the opposition. The possibility can also not be excluded that in the course of a year the electorate could have moved to new political priorities together with the defecting Deputies.

That is, in March 2006 the people could have wanted one thing, and in April 2007 – something else. In the final analysis, if the voting of individual deputies from opposition factions together with the coalition is betrayal, then the voting of an entire faction – ByuT [the bloc of Yulia Tymoshenko) for the Law on the Cabinet of Ministers could be seen as an even greater betrayal. This after all virtually destroys the political weight of the position of President of Ukraine. And why in

that case not consider as betrayal of the electorate the fact that President Yushchenko himself put forward the candidacy of Viktor Yanukovych as Prime Minister? After all, it was to stop the latter coming to power that his electorate stood out on the winter Maidan Nezalezhnosti [Independence Square, in Kyiv].

One way or another, from the legal point of view, it is not possible to prove that the change in the strategy of voting by a whole faction or the change in political tastes of the President with regard to the candidacy of Viktor Yanukovych were a blessing for the people, while the change in the voting strategy of individual deputies was an evil.

It could be said that the infringement of Article 83 of the Constitution with regard to the formation of a coalition of factions did not so much distort the results of the people's expression of will in March 2006, as potentially influenced the stability of V. Yanukovych's government later. Parties after all join the coalition; they do not dissolve into it. In its turn the existence of a coalition is aimed exclusively at forming a Cabinet of Ministers. The Constitution says virtually nothing about the subsequent fate of the coalition, or indeed of the opposition. For example, from Article 80 § 2 of the Constitution it follows that deputies' votes are on principle an individual matter. This means that they are governed by their own choice, intuition, and not by party (factional) discipline.

As far as the President is concerned, analyzing the events of autumn 2006 in his Decree № 264, he came to the conclusion that the practice of mass filling of their ranks through individual or group membership had led to «disdain for the constitutional electoral rights of citizens of Ukraine».

According to the Constitution and a special law, the electoral rights of Ukrainian citizens consist in voting for a party or bloc list (the majority system is in force only at elections to village and settlement councils), or themselves getting on such lists. There are no serious problems with active electoral law in Ukraine however the situation with passive electoral law is considerably worse.

The constitutional amendments of 8 December 2004 and the Law «On the election of National Deputies of Ukraine» in the version from 19 January 2006, introduced a proportional system of voting with virtually closed electoral lists. This adversely affected the political rights of Ukrainian citizens, while making it possible to fill the candidate lists of parties and blocs with eccentric oligarchs, guards and chauffeurs of VIPs, as well as stage and television stars. Having enabled the deputy corps to be formed from the business or overtly exotic layers of society, the electoral law automatically stimulated the lack of control and unpredictable behaviour of parliamentary neophytes.

One can say that the «political reform» [as the constitutional amendments are known – *translator*] of 2004 and the electoral law adopted on its basis have made Ukrainian politics overtly corporative and the Verkhovna Rada itself the epitome of some kind of casino club for the rich. Since the amendments and the electoral law were voted in by the last makeup of the Verkhovna Rada together with the President to be, it is these people who bear responsibility for the systemic failings they contain. At the end of the day, the problems of the present situation in parliament and society have arisen not from deputy renegades, but from the systematic features of the «political reform» and the legislative decisions passed on the basis of these amendments.

Furthermore, the procedure for forming the coalition does not in itself directly influence the exercising by Ukrainian citizens of their electoral lights. Neither in 2006, nor later, was there success in installing the imperative mandate (which has been retained in about 10 countries) at the highest, parliamentary, level. After all, a National Deputy is not a primitive instrument for passing on the mood and preferences of the electorate, but a responsible, independently thinking and politically autonomous individual. The present pre-election programme is a declaration of intentions and not battle regulations. It can be exercised in very many ways. It is not surprising that in the formal – legal sense National Deputies have the right to choose their tactics for parliamentary life.

With regard to the real state of political culture in the country, in 2006 this was not on a high level. Back in autumn 2006, experts noted that in Ukrainian parliamentary factions the main decisions are made by the party elite which comprise 3 or 4 people. It is not surprising that the style of work of such totalitarian factions arouses only reluctance and disgust. On the other hand, the inconclusive state of the country's political choice has fuelled party authoritarianism.

The political will of the Ukrainian people remains balanced between two vectors of development leading to significantly different prospects for the country. . It is for this reason that having gained a

difficult victory in the Presidential elections, the Orange forces should have done everything to gain the support as swiftly as possible of at least a few percent of the blue and white electorate. However the historic chance of 2004-2006 was to a large extent lost. . The policy of the O range regime did not become truly caring and humane, and focused on the needs of the average person.

For example, the move towards the European values they declared required radical changes in government attitude to education. After all, only an educated person can understand the meaning of freedom, the dignity of the individual and of democracy. Yet Ukrainian provincial schools, just as their teachers, have remained in penury. Not even the network of provincial bookshops, traditional for communist times, was renewed.

The law was abused and legislation did not work as a universal regulator. Key witnesses were invited to the Prosecutor General via national television channels, and the vote-riggers in the elections could laugh at the weakness of the victors. The appalling, yet logical, consequence of this political atmosphere came with the former Prosecutor General Mykhailo Potebenko, being finally awarded the honour of Yaroslav the Wise.

It was then that the spread of salaries in the State sector reached 1:40. And this was while self-confidence contrasted with the extremely modest erudition of the ruling elite. The freedom of speech achieved as a result of the «Orange Revolution» made it possible for the public to look at the real intellectual possibilities of the political beau monde. It is not, therefore, surprising that at the 2006 parliamentary elections it was only the inertia of human hopes that saved the Orange camp.

The political mistakes of the Orange camp in 2004-2006 led to an expansion in the coalition unity in the new parliament. This had an adverse effect not so much on national or people's sovereignty, as on pluralism, polyphony and diversity of Ukrainian civic society. Excessive unanimity became potentially dangerous for the rights of political minorities and the individual. Consolidation to fit circumstances has become a serious risk to Ukrainian liberalism since it threatens to excessively regulate the political processes in the country. Hypertrophied unanimity has effectively turned into a factor for stagnation in Ukrainian society.

On the other hand, there was not in fact any usurpation of power at that time in Ukraine. Since the concept of usurpation traditionally means *violent seizure of power*, there would be no grounds for asserting that the move of deputies from the parliamentary opposition to the side of the majority represented or was the precondition for coercion. There were no obvious signs of force in 2006. it would hardly be possible to liken the financial and business temptations organized by the coalition for their opponents to coercion.

The threat to Ukraine's national security began emerging at that time not so much because of the coalition's political hospitality as due to an escalation in the general political problems in the country. Even a superficial glance at the political situation which developed over the 2006 parliamentary elections makes it possible to conclude that the executive branch of power has split into two powerful centres. The constitutional split provoked by the «political reform» is in turn organically ending up with «two Ukraines» [Mykola Riabchuk) – East-South and West-Centre. As a result, Ukraine ended up in 2006 with the competition, dangerously exacerbated by the «political reform» of two political stands and two visions for the strategic development of Ukraine. The historical and geopolitical grounds for this confrontation are the fact that the centre and West voted Viktor Yushchenko President, and the East and South made Viktor Yanukovych Prime Minister..

Thus after the 2006 parliamentary elections, the real threat for Ukraine lay less in the coalition's majority, than in the split in government power at the highest level, exacerbated by the «political reform». It was this that led to the lack of cohesion between Ukraine's domestic and foreign political course, confrontation between bodies of local self-government and the State administration in the East and South of the country.

At that time most dangerous for the country was the revival of the retrograde – conservative style of government typical for the Kuchma period which the leaders of the coalition almost immediately tried to reinstate. The general atmosphere was also oppressed by the archaism of primitive myths which continued to dominate in the system of State education, the superstitious attitude of even educated layers of the population to the idea of European integration and Ukraine's potential membership of NATO.

It would also be difficult to overestimate the danger implicit in the disregard for the Constitution and laws of the country by the authorities and high-ranking public officials. Sufficient to mention the blocking of the functioning of the Constitutional Court by the former Speaker of Parliament V. Lytvyn, the fact that the Head of the Supreme Court V. Malyarenko and the Human Rights Ombudsperson N. Karpachova took part in the elections, the voting by deputies of the Verkhovna Rada using other deputies' cards, the judgment of the Constitutional Court in favour of Leonid Kuchma's standing for office a third time.

Even then the harmful impact became apparent of the model of proportional representation for district and regional bodies of local self-government. The incredible spread of salaries in the State sector is destroying national unity. The situation where a National Deputy receives a salary which is a few dozen times higher than the salary of a highly qualified teacher or surgeon is a greater threat to national unity in Ukraine than any upheavals at the level of parliamentary factions. Even American newspapers wrote at the time about the disproportionately generous funding for Ukrainian public officials and National Deputies. Some analysts asserted later that with the kind of divide in State salaries as that in Ukraine, it is simply impossible to create a political nation.

There was in general a continuing and deepening political crisis in Ukraine during 2006. This was first of all the general crisis of confidence of the population towards the authorities. This was also a crisis arising from the primitive level of awareness of the population resulting in large numbers of Ukrainians being afraid of Brussels and NATO. It was a crisis of the economic divide between the rich and the poor, as well as between higher and lower ranking public officials. It was a crisis of constitutionalism and lawfulness, resulting in high-ranking public officials consciously ignoring the requirements of their own law-based system.

In the strategic sense, the majority of features of crisis in Ukraine are linked with the fact that it has still not managed to part with the theory and practice of totalitarianism. In the sphere of State governance the generation of communists continued to fight the «lost generation» of Komsomol members. The instrumental focus in the behaviour of political leaders, their inability to be guided by real values and principles, the mass disregard for the Constitution and legislation, untrammelled political ambition – these are all results of a plebeian political culture and of a long-term shortage of modern knowledge and freedom. On the other hand, as more time passed, the public's attitude to the Ukrainian political reality became increasingly critical.

The systemic failings of the constitutional amendments have continued to destroy Ukraine's political and economic course. The overt primitivism of the electoral system created specially for the parliamentary and local elections of 2006, as well as the imperial mandate at local level, has made Ukrainian politics unwieldy and its State life a permanent settling of personal accounts. The situation induced by the hastily revamped Constitution has made Ukrainian politics at once hypocritical, emotionally distasteful, inhumane and ineffective.

The more rhetoric and slogans were declared by the political elite, the deeper the divide between them and the population. In the final analysis the mutual recriminations have made one simple fact clear and transparent: all without exception political parties and branches of State power bear responsibility for the systemic crisis in Ukraine. And the greatest blame lies with those who were and should remain the most sensible and intelligent.

Therefore the President's decision later to dissolve parliament was a hard nut to crack for the Constitutional Court not only because of the purely legal features. It was difficult in the first instance through its moral and ethical basis. From the legal point of view one did not need to prove that the President does not have the right to arbitrarily dissolve parliament. Viktor Yushchenko is not the Tsar's Governor in the Caucuses who in the times of the Russian Empire usually had discretionary powers. On the other hand the President was right in the sense that the Ukrainian State had hit a dead end. Society which had become indifferent was disintegrating before our eyes, and we had to somehow react to this.

In themselves snap elections in a country which is growing and changing rapidly are easy to justify. However the energy of the population at such elections needs to be used to maximum effect. The real problem which Ukraine now faces is that the dissolution of parliament and new elections will not per se enable Ukraine to come out of its systemic crisis. The reasons for the latter lie con-

cealed in the matrix of the «political reform». While this exists, no Ukrainian parliament or government will be able to escape its destructive influence.

In order therefore to cure the illness, more daring measures are needed. The «political reform» can be put to a nationwide vote or abolished in the Constitutional Court. There is no shortage of legal arguments for this. It is well-known that the constitutional amendments voted in on 8 December 2004 had not undergone the proper scrutiny of the Constitutional Court. The amendments to the Main Law were, moreover, voted on in a package with an ordinary law. The latter was a normative act which determined the personal fate of the future President of the country! In the final analysis the primitively revamped 2004 Constitution really is illegitimate. It is absolutely not a document which we should defend with all our might. Since the responsibility for the reform lies with all branches of power, all need to be prepared for radical changes.

It is evident that Ukraine's problem lies not in the fact that «bad» politicians seized the initiative in 2006 from «good» politicians. What is to be regretted is that even the «good» politicians are absolutely not concerned about the reputation of their own judicial system. One feels particular sympathy for the Ukrainian Constitutional Court. Whatever else should be said, they do, after all, form the legal elite of the country. The previous Constitutional Court was discredited in the eyes of the international community due to the judgment regarding a third term in office for Leonid Kuchma. At present it is not clear whether the new Constitutional Court will wish to sacrifice its reputation in favour of political ambitions.

In any case Ukrainian voters should think seriously whether it is worth once again giving their votes to those who have awarded themselves salaries dozens of times higher than those of their voters, and also to those who for the sake of unlimited ambition damaged the national Main Law. It is indeed time for Ukraine's rebirth. However this can begin from something understandable to all and simple. This could be, for example, a review of the procedural elements of the «political reform». This may seem from the outside insignificant however it could open the door for us into the fresh air.

2. THE ELECTORAL SYSTEM

The 2006 elections brought Ukraine a surprise since as soon as they ended the country began slipping towards new elections. However it would be difficult to say whether the Verkhovna Rada in its 2007 format really has a chance of becoming better than its predecessor. One can however already say that Ukraine's electoral system is itself in a state of crisis. If a just cause can only be achieved through decent means, then it would be difficult, if not impossible, to overcome the political crisis on the basis of the present electoral system.

It so turned out that in attempting to describe the situation with regard to changes in electoral legislation in 2006, the conclusions organically emerged as ten relatively autonomous theses.

First and foremost, one must note that the principles of the Ukrainian electoral system are set out in Articles 69-74 of the Ukrainian Constitution which make up Chapter III «Elections, Referendum». According to Article 155, this Section, together with Chapter I «General Principles,», and Chapter XIII – «Introducing Amendments to the Constitution of Ukraine,» are subject to heightened protection. What this means is that any attempt to remove or modify constitutional articles about elections and referendums must be affirmed via a referendum. Chapters 1, III and XIII are amended according to particular regulations requiring complex juridical procedure.

At the same time, nothing in domestic constitutional law changes as quickly and as often as current electoral laws. Almost every election to the Verkhovna Rada and local councils since Ukraine became independent has been held on the basis of new or significantly updated electoral laws. The same must be said about presidential elections.

Aside from the Constitution, Ukrainian electoral system is made up of the following laws:

«On the Ukrainian Presidential Elections» № 474 – XIV from 05.03.99 in the version of Law № 1630-IV from18.03.04;

«On specific aspects of the application of the Law of Ukraine «On the Ukrainian Presidential Elections» during the re-run of the voting on 26 December 2004», № 2221-IV from 8.12.04;

«On the elections of National Deputies of Ukraine» № 1665-IV from 25.03.04 in the version of Law № 2777-IV from 07.07.05 and «On the elections of Deputies to the Parliament of the Autonomous Republic of the Crimea, local councils and village, settlement and city mayors» № 1667-IV from 06.04.04, with relevant amendments introduced to the Code of Administrative Justice № 2747-IV from 06.07.05, as well as laws № 3253-IV from 21.12.05. № 3368-IV from 19.01.06, № 3437-IV from 09.02.06, № 3519-IV from 14.03.06

In addition, after the adoption of Law No. 2766 from 18.10.01 «On the elections of National Deputies of Ukraine», the Constitutional Court issued judgments with regard to the constitutionality of various provisions. These were CCU Judgment № 1-18/2002 from 30.01.02 and CCU Judgment № 13-рп/2003 from 03.07.03 which should also be considered part of electoral legislation.

In terms of the development of the national electoral system Ukraine first had a majority system for all councils without exception. This was changed to a majority – proportional system for parliamentary elections, and majority for local council elections. Finally, under the pressure of the best expectations and hopes, as well as due to the «political reform» of 2004, the mixed system of parliamentary and majority system of local elections was replaced by an entirely proportional system.

The initiative was brought to its logical conclusion on a wave of enthusiasm. Henceforth only village and settlement councils are not elected accorded to party lists. As a result, the stability of the electoral system proclaimed in the Constitution has in practice turned into unprecedented fluidity of current electoral laws, reminiscent in dynamic to that of mercury.

At the end of 2004 the Law «On the Ukrainian Presidential Elections» was adjusted before the last (third) round of voting by a law on special aspects of the application of that law. . It is known that the early elections to the Verkhovna Rada in 2007 are to be held on the basis of a package of legislative amendments. These involve, for example, establishing a minimum voter turnout of 50%, re-election of the Central Election Commission [CEC] on a «parity» basis and the nullification of more than a third of the current deputy mandates, etc.

As we know, electoral systems used in today's world are not only majority, proportional or mixed. Aside from the traditional classification, they can also be defined as relatively simply or relatively complicated. Even if elections take place through postal voting (Europe) or pressing buttons or levers on an electronic device (USA), they can be placed in the first or second group. For example, the Ukrainian elections held with the use of ballot papers may be considered relatively simple.

In mathematical language the Ukrainian system of the expression of the people's will could be called «arithmetic», in contrast to those systems which can be considered «algebraic», i.e. not entirely simple. For better or worse, Ukraine has from the outset been modifying a simple system for counting votes although specialists know that the more complicated an electoral system is, the closer the outcome is to the mood and preferences of the electorate. This is of course when the complexity is in line with the level of preparation of the voters and the electoral commissions.

On the other hand, if at the elections consideration of individual preferences is to be ensured or other mathematically or organizationally complex systems are used, this demands an educated corps of specially trained electoral commissions. In this case volunteers need to be specially selected, encouraged and trained. It is possibly for this reason that in Ukraine technologies demanding the use of complicated electoral formulae are consistently avoided.

However, even with the simplified 2006 elections, a lot was reminiscent of a political rush-job. It is quite often the case that people are chosen for working at electoral commissions at the last minute, making it impossible to give them even basic training. No wonder that at the last parliamentary elections independent observers noted a huge number of mistakes when preparing electoral protocols.

A separate problem of the Ukrainian electoral system during this period was the use of a proportional model at local level. With the exception of the majority elections to village and settlement councils, the other local authorities and bodies of local self-government are elected according to the number of votes cast for a specific party list. on the basis of party lists. At the same time all parties and blocs registered with the Ministry of Justice and the Central Election Commission function

on the basis of nationwide programmes. This is the standard requirement of the Law «On political parties in Ukraine» № 2365-III from 05.04.01.

Since all party programmes and charters in Ukraine are nationwide, at the elections for bodies of local self-government, a centralized political view was effectively transplanted to the local level. Yet the interests of local areas and the regions often fail to coincide with the interests of the centre. They therefore are far from best suited to fit into the constraints of party programmes.

Discrepancies also arose because Ukraine recognizes in the main a *civic theory* of local self-government according to which the first participants in self-government are considered to be the territorial community – an autonomous source of public power which does not belong to the State but is independent (municipal). Under such a system local self-government and its bodies only deal with issues of local importance, while the functions of government authorities are implemented by the local State administrations.

According to Article 140 § 1 of the Constitution the territorial community is seen as the primary participant in local self-government, with this complying with its *civic* concept. This means that local self-government in Ukraine is confined to resolving issues of local character within the limits of the Constitution and the laws of Ukraine, and is concentrated in villages, settlements and cities. However, although district and regional councils are not classified as *the base level* of local self-government, it is specifically they which deal with the main issues of Ukraine's provincial life.

Since the party imperative mandate which is legislated for at local level, runs counter to a civic system, deputy factions in regional and district councils found themselves in 2006 under double pressure. On the one hand they are governed by a political centre which is little aware of the real situation at local level. On the other, even non-party affiliated deputies of local councils find themselves under the pressure of faction discipline. This has on occasion already led to the formation of truly authoritarian sects – self-sufficient structures which are however ineffective from the point of view of implementing local policy.

We thus see that the transfer of political centralization and factional discipline to the local level did not in 2006 create a constructive working atmosphere in regional and district councils. This resulted in the electoral system being excessively concentrated on party allegiance and led to the formation of irreconcilable political groupings among deputies.

Furthermore, the local imperative mandate has distanced individuals with independent thinking and their own political position from taking part in running government and public matters. Under current electoral legislation, there is simply no place for such people in local representative bodies and in the Ukrainian parliament. As a result by no means all politically substantial individuals are able to fully enter the public sphere and gain access to the media.

As soon as an intellectually developed and self-sufficient individual wants to serve his or her community, s/he has to defer to a local party functionary. This is despite the fact that the person's stature is often incomparably greater than that of the party activist. The official leader's ambition conflicts with the «egoism» of the newcomer leaving the latter outside the political process. One way or another, individualism, as a typical attribute of liberal society has absolutely failed to find root in Ukraine. Instead we have a new version of Ukraine «democratic centralism».

It is not clear what remains for autonomous individuals to do under such a system. Their intellectual and organizational potential is not being channelled which significantly increases the level of political frustration in society. It is galling that in today's Ukraine, not only the leader of the opposition Yulia Tymoshenko, but also the President Viktor Yushchenko, support the idea of an imperative mandate. There has not yet, thank goodness, been any success in introducing the imperative mandate in parliament, however it exists and is continuing to do its deed at local level.

The Parliamentary Assembly of the Council of Europe [PACE] has tried to steer Ukrainian politicians away from excessive administration, however the national electoral system as seen in 2006 continues to stubbornly thrust people who think for themselves in a straightjacket of party programmes and plans. This has resulted in a situation where parties and factions do not boast of specific individual members, but rather where belonging to the clan ensures public attention for a «cog» in the system.

In general, the move from a majority electoral to a mixed system and from there to one which is proportional with closed candidate lists has turned Ukrainian elections into voting according to party labels. From the outside it looks as though the «political reform» of 2004 introduced the universal slogan: vote for the party, the party will sort it all out.

The imperative mandate, however, has not only resulted in excessive political influence from the centre on the local authorities. For over a year the image of young parties has been discredited by the lack of experience of their provincial functionaries. This in turn leads voters to suspect that at the national level the party is flawed and has no future.

The introduction in 2006 of voting entirely on the basis of party candidate lists means that voters need to understand not only elementary rules, but also the nuances of the political game. Yet this understanding at present in Ukraine, except in Kyiv, is lacking. A proportional system thus requires proper political education in the provinces. Such education in turn demands a level of material wellbeing which people do not at present have in rural areas and small towns.

The inability of the average voter to come to grips with the processes going on behind the party scenes has already led to a revival in Ukraine of a kind of census (limited) suffrage system of democracy. Since the constitutional amendments of 2004 and the 2006 elections, State governance and local self-government have become more and more reminiscent not of the power of the power, but of government by the owners on behalf of the owners and in the interests of the owners.

Although debate is raging in Ukraine as to whether the imperative mandate is expedient, what is meant here is not the classical form of imperative mandate (where deputies depend on the electorate, on the orders of their voters), but rather strict party discipline, political centralism in its post-Soviet variant. All of this indicates that in 2006 the electoral system in Ukraine did not succeed in becoming democratic and open. Instead the pyramid of central totalitarianism disintegrated into small pyramids of authoritarianism at the local level. Instead of one «governing and guiding» force, Ukrainians have around 150 parties, with the level of democracy of each remaining that seen during communist times. The right of decision in Ukrainian parties is held by a small elite comprising three or four influential individuals.

Such a system does not take into account the fact that in the modern world there are more and more often situations where each participant is right in their own way. On the other hand, the more complex a political problem, the smaller the number of people who are capable of resolving it. All of this suggests an urgent need to understand the value of the individual's role combined with tolerance and pluralism. Unfortunately, individualized approaches to the assessment and resolution of problems in Ukraine are not encouraged and are seldom observed.

In 2006 the Ukrainian political elite demonstrated a low level of willingness to understand that in the country's development strategy several variants could coexist. Politicians viewed the mosaic nature of Ukrainian society, its diversity, in a merely formal manner, and not as something suited for practical application. A spirit of animosity and suspicion remains dominant not only the area of local policy, but at legislative level. Many political leaders and official figures continue to espouse a form of xenophobia. This can be understood since it is precisely in Soviet ideological strata that one finds the roots of the imperative mandate: ostracism of dissident thinkers; electoral lists which were closed for the general public; ideological intractability combined with readiness to use blackmail in voting.

Real life is multi-faceted and flexible, yet the Ukrainian political system remains unyielding. One sees a strange mixture in Ukraine of political pluralism with harsh party-corporative ideology. On the one hand, the number of political parties in the country far exceeds the number of themes in world literature. On the other they are all marked by an exaggerated idea of their own significance. Although there are a fairly limited number of strategies for political development in Ukraine (rightwing, leftwing, centrist, a radical wing, «greens»), party ambitions bear little relation to their popularity ratings. This is not surprising since even minimal legitimacy enabled Oleksandr Moroz to head the Verkhovna Rada in 2006.

At the same time parties which in 2006 boasted the names of the Speaker of Parliament, the Head of the Supreme Court and the first (after M. Hrushevsky) President of the country, could not overcome the three-percent vote threshold. The current preferences of the Ukrainian voters are thus in marked contrast with the self-assessment of the former leaders of the country. Since the political

tastes of the electorate undergo rapid change in Ukraine, the authorities resort to constant re-editing of the national electoral system.

This has exacerbated the crisis in passive electoral law initiated by the constitutional reform of 2004. Although the number of deputy mandates is always limited, in a law-based country this does not affect the opportunity for members of the public to stand for office in elections. As stated in Article 38 of the Constitution «Citizens have the right to participate in the administration of state affairs, in All-Ukrainian and local referendums, *to freely elect and to be elected* (my italics – V.R.) to bodies of state power and bodies of local self-government».

However under the new electoral system in Ukraine there is no free access by citizens to passive electoral law. It is paradoxical, but in Ukraine we have a situation where one can stand for the office of President by paying a bond and putting oneself forward, yet one can only become a candidate for deputy of a district country by being included on a party candidate list.

As already mentioned, the current version of the Law on the elections to the Verkhovna Rada was drawn up especially for the 2006 parliamentary elections. At that time the legislators aimed at dealing with the shortcomings of the previous law which had not, they believed, sufficiently envisaged legal guarantees against vote-rigging and safeguarded transparency in the counting of votes.

The new law was marked by detailed regulation of the electoral process with, for example, a complicated structure for electoral commission protocols. Unfortunately in practice the procedural guarantees were unable to avert elementary buying and selling of places on the candidate lists. An obvious shortcoming of the law was its excessive complexity. The legislators tried to ensure efficient elections, however in their wish for perfection they lost any sense of measure.

As a result, the juridical attributes of this large-scale normative act made the law more of a manual on the ideal training of personnel, «Bureaucracy according to Max Weber». At the same time electoral commissions were to be made up of volunteers who, for a number of objective reasons, did not have time to fully master the complex procedural aspects of their regulations. This led to confusion in completing protocols and to unwarranted suspicions that commission staff had been corrupted, and it prompted appeals against the outcome in many electoral polling stations in the courts.

Since In public law the difference between *beneficial* and *harmful* is often felt at the level of legal nuances, elections must have maximum balance of procedures. This requirement is fair both for the polling station and for the Central Election Commission itself. If one looks at the Ukrainian electoral system from this viewpoint, it becomes clear that in 2006 it was constructed on the principle of almost total mutual distrust between the participants in the electoral process.

3. POLITICAL CONFLICT

The constitutional amendments of 2004, together with the 2006 elections, serve as a prologue to the dramatic events of 2007, against the background of which this analysis is being written. The political future is predicted by the historical past, and we therefore feel it necessary to analyze the political – legal situation which emerged in Ukraine after the issuing of the President's Decree «On the early termination of the powers of the Verkhovna Rada of Ukraine and the setting of new elections» from 26 April 2007.

As we know, on 2 April 2007 President Yushchenko issued Decree No. 264 «On the early termination of the powers of the Verkhovna Rada of Ukraine» which pointed to and at the same time significantly exacerbated the intense political crisis in Ukraine. After a not very long period had elapsed, the President made a second attempt to resolve the political confrontation in a legal manner. On 26 April he issued a second Decree dissolving parliament and setting new elections.

This Decree No. 355 (hereafter the Decree) states: «the refusal by the Cabinet of Ministers to provide the appropriate funding, and effective inaction of the Central Election Commission make it impossible to hold the early elections to the Verkhovna Rada on 27 May 2007». Therefore, «in order to create the proper conditions for all participants in the electoral process, and bearing in mind the fact that pursuant to Article 77 § 2 of the Constitution the date of the early elections is

directly linked with the date on which the decision regarding the early termination of the powers of the Verkhovna Rada, the President's Decree No. 264 of 2 April 2007 ... must be considered to have lost legal force.»

It did not, furthermore, pass unnoticed that the new Decree was not merely a juridical copy of the first, legally speaking entirely inept document dissolving the Verkhovna Rada. It not only set a new date for the early elections, but also significantly changed the entire chain of juridical argumentation.

Unlike the first attempt, the second Decree on dissolving parliament contained important references to Article 90 § 2.1 and Article 83 § 6 of the Constitution. Both references are not only important, but also necessary since Article 106 § 1.8, which gives a list of Presidential powers, categorically and unqualifiedly affirms that the President of Ukraine shall «terminate the authority of the Verkhovna Rada of Ukraine *in cases stipulated by this Constitution*: (my italics – V.R.). In the juridical sense this means that the President may dissolve the Verkhovna Rada solely on the grounds of three groups of circumstances, listed in separate points of Article 90 § 2 of the Main Law. He is prohibited from behaving otherwise also by Article 19 of the Constitution.

It is precisely Articles 19 and 106 which prevent the President from dissolving the Verkhovna Rada directly on the basis of Article 102 § 2, this being the dramatic conclusion which many supporters of the President tried to argue in the national media and on the Internet. The most notable here were the analytical discussions and interviews with M. Riabchuk, B. Futey, O. Merezhko, N. Petrova, O. Severyn and F. Venislavsky.

Instead, in the President's new attempt, the logic behind the juridical grounds is considerably more cogent. For example, the second Decree maintains that «on 11 July, at a plenary session of the Verkhovna Rada the formation was announced of a coalition of deputy factions which included National Deputies who were not members of the factions forming the coalition. In March 2007 this practice took on a mass nature. Due to this the preconditions arose for the exercising by the President of Ukraine of his right to terminate the powers of the Verkhovna Rada early on the basis of Article 90 § 2.1 of the Constitution given that the coalition of deputy factions in the Verkhovna Rada had not been formed in accordance with Article 83 of the Ukrainian Constitution».

Indeed, according to Article 90 § 2.1, «The President of Ukraine shall have the right to an early termination of powers of the Verkhovna Rada if: 1) the Verkhovna Rada of Ukraine fails to form a coalition of deputy factions in compliance with Article 83 of this Constitution within one month; This means that in order to comply with Article 90 § 2.1, the prior adherence by all relevant parties to the requirements of paragraphs six and seven of Article 83 is needed. Given that the norms of the Constitution often function in whole groups together, this type of juridical interrelatedness should be regarded as natural.

If we analyze the general content of Article 83 of the Constitution, it is not difficult to conclude that its norms create a constitutional institution. In the legal sense this means that individual paragraphs of the article act as independent normative guides which, although they do not have autonomous sanctions, are equipped with their own scope and conditions. Moving away from legal language, this means that the main material and procedural points related to the formation of a coalition of deputy factions in the Ukrainian parliament is fully outlined in paragraphs six and seven of Article 83.

For example, Article 83.§ 6 states that «A coalition of deputy factions comprising a majority of people's deputies of Ukraine in the constitutional membership of the Verkhovna Rada of Ukraine shall be formed in the Verkhovna Rada of Ukraine on the basis of the results of election and on the basis of the harmonisation of the political platforms». Arithmetically speaking, this means that the critical number for the creation of a properly functioning coalition of deputy factions is 226. Furthermore, this figure is achieved via group membership.

Article 83 § 7, in turn, stipulates that «A coalition of deputy factions in the Verkhovna Rada of Ukraine shall be formed within one month from the date of opening of the first meeting of the Verkhovna Rada of Ukraine held upon regular or extraordinary elections to the Verkhovna Rada of Ukraine or within one month after the date of termination of the activity of a coalition of deputy factions in the Verkhovna Rada of Ukraine.

From the legal point of view, it is these norms which are crucial for providing evidence and general juridical justification for the second Presidential Decree. Although Article 83 § 9 says that «The basis for the formation, organisation, operation, and termination of activities of coalition of deputy factions in the Verkhovna Rada of Ukraine shall be established by the Constitution of Ukraine and Rules of Procedure of the Verkhovna Rada of Ukraine», in fact the Constitutional Court, in judging whether the President's Decree was constitutional should be guided not by the Rules of Procedure, but solely by the provisions of the Ukrainian Main Law.

It thus follows from the logic of the Constitution that a coalition of deputy factions must be finally formed within a month, and its parties must exclusively be deputy factions. Furthermore, the overall number of Deputies in the factions which have decided to join the coalition cannot be less than 226. Effectively this is all that Ukraine's Main Law stipulates. All else is the juridical attributes of the Rules of Procedure, that is, a statement of the will of a majority of National Deputies which does not require (since the Rules of Procedure are not a law), the official consent of the President.

Maybe it was for this reason that the Ukrainian parliament chose a free (and then unconstitutional) path for forming a coalition on the basis not only of group, but also individual membership, while extending the period of its formation indefinitely. In other words, the Verkhovna Rada, having formed an initial majority within a month, deliberately forgot after this to close the coalition doors. This step, as we know, led to permanent additions to the coalition from further – individual and group – intakes.

At first glance such practice seems reasonably innocuous however its juridical subtext holds a potential risk for the political stability of the country. If one considers that the coalition is all the time functioning and permanently open, then the government which it forms is permanently open for dismissals and reappointments. Let us assume that during a particular period of time this permanently functioning and open coalition is made up of 226-227 Deputies. The government can then fall at any moment if even the smallest faction leaves the coalition.

Furthermore, if the doors to the coalition are permanently open, then is it possible to consider it formed in the juridical sense at all? That is, is it formed in the sense envisaged by paragraphs six and seven of Article 83 of the Constitution? Any increase in the coalition outside the month time frame stipulated by the Constitution for its creation shows that it is in a state of constant turbulence. After all, if one can freely join the coalition at any moment, then one can just as freely withdraw from it. The latter means that the coalition can collapse or be made up independently of the time frame set by the Main Law for its organization formation.

Although the Constitution does not say anything on this subject it would seem fitting to assume that its creators' intentions were by no means so thoughtless. Whatever politicians may say on the capital's squares, a coalition which is permanently functioning and open for joining and leaving is reminiscent of a Verkhovna Rada permanently open for re-election. It is therefore logical to assume the opposite: according to the logic of the Main Law, the people vote for parliament once every five years and parliament once every five years creates, via a coalition, a government.

What is more, if the coalition is permanent and individuals can join it, they can also individually leave it. And this automatically leads to the fate of the government depending not only on the smallest coalition faction, but on any two or three National Deputies. And these can be Deputies from the makeup of the coalition, or from the opposition, i.e. from outside. Is this not a classic scenario for political blackmail? The difference between renegade Deputies in the given case will lie only in the fact that some are the participants, and others the objects of desperate political deals. If the coalition consists of 226 National Deputies, and any can join or leave whenever they please, this will mean the renewal of the Polish liberum veto in a Ukrainian variant. In today's reality, such a set up could lead to corrupt scenarios the likes of which we could never have imagined.

While the Constitution does not contain a direct prohibition on such Deputy coming and going with respect to the coalition, nor does it actually permit such moves outside the month's time frame. Such permission is not envisaged ether for individual parliamentarians, or for deputy factions. As we know, on the basis of Article 19 of the Constitution, public authorities and their officials do not have substantial, that is, strategic freedom. The Main Law deliberately avoids giving real discretionary powers to public officials and parliamentarians.

At least a doctrinal analysis of the provisions of the Ukrainian Constitution suggests that its rationale is such. On the issue of the formation of a coalition, this logic is seen in the coalition of deputy factions being created under normal circumstances only once and exclusively within a month, after which the coalition's doors remain closed for the entire term in office of the newly-elected Verkhovna Rada. The ongoing readjustment of the coalition's ranks can take place only where the number of National Deputies has become less than 226 *for natural reasons*. For example, a legitimate reduction in the size of the coalition could occur not through the permitted withdrawal from its ranks of factions or individuals, but only for the reasons foreseen in Articles 81, 87 and 115 of the Constitution.

Such circumstances can arise as the result of the resignation of a National Deputy; the coming into legal force of a conviction against a specific Deputy; a Deputy's being declared incapable of looking after him/herself, or missing; the suspension of the Deputy's Ukrainian citizenship or his/her departure from Ukraine for permanent residence abroad; a breach in the incompatibility requirements of a Deputy's mandate with other activities; withdrawal from his/her faction, as well as due to his or her death. In addition, a coalition must be re-formed as a result of the dismissal (Article 87 § 1 of the Constitution) or resignation (Article 115 § 2 of the Constitution) of the Cabinet of Ministers.

It should also be noted that under the Constitution, a coalition of deputy factions is created by the Verkhovna Rada only as a means of forming a government – the Cabinet of Ministers of Ukraine. The Main Law does not speak of any other functions or possible uses for a coalition. Of course critics of such a point of view can refer to the Rules of Procedure which give considerably more attention to the coalition, as though in this way broadening its range of possible applications. However we do not in fact know whether the Rules of Procedure in this aspect are constitutional. Although the Rules of Procedure of the Verkhovna Rada of Ukraine are not a law, on the basis of Article 150 § 1.1 of the Main Law they can also be examined as to whether they are constitutional.

Some may also point to the fact that according to Article 83 § 8 of the Constitution «A coalition of deputy factions in the Verkhovna Rada of Ukraine shall... present candidates for the Cabinet of Ministers of Ukraine». This means, they suggest, that isolated changes of ministers in the government during the entire term of office of the Verkhovna Rada take place through the mediation of the parliamentary coalition.

However, prior to an interpretation of this point by the Constitutional Court, one can insist that isolated changes of ministers in the Cabinet of Ministers take place not on the basis of Article 83, but in accordance with Article 114 § 4 of the Constitution. The latter states that «The candidate for office of Prime Minister of Ukraine is submitted by the President of Ukraine on the suggestion of the coalition of deputy factions», while «other members of the Cabinet of Ministers are appointed by the Verkhovna Rada upon the submission of the Prime Minister.»

There are thus grounds for considering that under the Constitution, a coalition of deputy factions submits proposals regarding the replacement of posts of «ordinary» ministers to the Prime Minister, and with regard to the post of Prime Minister – to the President of Ukraine. However even in this case there are no convincing grounds for asserting that proposals regarding individual ministers can be submitted by the coalition as well as beyond the «sixty days after the resignation of the Cabinet of Ministers of Ukraine» (Article 90 § 2.2 of the Constitution). This can suggest that outside the time frame given by the Main Law for the formation of the government, a coalition does not, in a constitutional sense, exist at all. If this be the case, then any changes in its composition beyond the time limit for its formation must be recognized as unconstitutional.

The thesis regarding a permanently functioning coalition seems extremely dubious from the point of view of Article 80 § 2 of the Main Law. If «National Deputies of Ukraine are not legally liable for the results of voting ... in Parliament and in its bodies», then what kind of coalition unity, and therefore, coalition at all, is it possible to consider?

The possibility cannot be excluded that for specifically this reason the Constitution of Ukraine does not require the early resignation of the Prime Minister or Cabinet of Ministers where there has been a natural reduction (on the basis of Article 81 of the Constitution) in the number of deputies who formed a coalition below the critical level.

In fact in the majority of cases a serious crisis with a parliamentary majority leads to the dismissal of the government following a vote of no confidence. However, although Article 83 § 7 of the Constitution requires that a coalition be formed not after the resignation of the government, but «within one month after the date of termination of the activity of a coalition of deputy factions in the Verkhovna Rada of Ukraine», in fact we don't actually know whether this norm refers to termination of the activity of a permanently functioning coalition, or only to the crisis over the parliamentary majority which has arisen due to a parliamentary vote of no confidence in the Cabinet of Ministers.

One way or another, the above suggests that the second Presidential Decree creates a real intrigue for the professional activity of the Constitutional Court. In itself the content of the Decree did not predetermine a court judgment in favour of President Yushchenko, nor in favour of his opponents. However it makes it possible to build a constitutional analysis of the President's initiative on serious arguments *pro and contra* and this markedly distinguishes the present juridical position from the political situation with the first attempt by President Yushchenko to dissolve the Verkhovna Rada.

4. CONCLUSIONS AND RECOMMENDATIONS

As our analysis shows, the specific features of the situation and development in Ukrainian constitutional legislation in 2006-2007 were determined by a number of political, legal and cultural factors.

The main legal factor during this period was the constitutional reform of 2004, carried out with glaring procedural irregularities. These constitutional amendments defined less than optimal parameters for the Ukrainian political process in the following two years, as well as adversely affected the legal content and political direction of Ukrainian electoral legislation as of 2006.

The main political event of last year was the elections to the Verkhovna Rada and local councils. The elections took place on the basis of a proportional representation electoral system, according to closed candidate lists. The lists were formed by the top individuals in the party on a non-transparent basis which led in future to the commercialization (corruption) of parliament, the destabilization of certain links in the chain (the government, prosecutor's office and the court) of the State mechanism.

Political corruption led to a deep crisis in society which provoked a reaction from both the opposition and President Yushchenko. His Decree on early parliamentary elections heightened the political confrontation in the country with this culminating in a fragile and temporary agreement between the main political players. As a result of political compromise parliament of the fifth (post-2006 elections) term supposedly «voluntarily» suspended its work. The situation in the country should be helped by parliamentary elections set in accordance with another Presidential Decree for the end of September 2007.

Given the situation that has developed, we feel impelled to give several recommendations which reflect our view of the events outlined above.

1. Sine the basis for the political crisis in Ukraine is the «matrix» of the political reform, the Ukrainian authorities should urgently return to the issue of a legal development strategy for Ukraine. This means that Ukraine will again be faced with the choice: whether to abolish the constitutional reform or draw up and pass a fundamentally new Constitution.

2. National electoral legislation needs considerable improvement. This involves first and foremost creating normative acts based on the principles of political freedom, trust, intellectual honesty and respect for the dignity of each of the parties to the electoral process. Simplified (primitive) voting according to closed candidate lists, as well as the ensuring factional authoritarianism should be condemned and removed from Ukraine's political practice.

3. The problem of the imperative mandate in Ukraine also needs to be resolved. This imperative mandate is the epitome of extreme conservatism in the contemporary world. In Ukraine it is the direct result of the country's tragic communist past. Particularly repugnant is the control over

the will of deputies exerted by the party (factional) top echelons. Similar practice is the epitome of a concentration on individual leaders in Ukraine's representative structures; it arouses antagonism and mistrust in society and lowers to a primitive level of governance over State and public affairs.

4. The present state of the judiciary is adversely affecting the implementation of both the Constitution and electoral legislation. As we know, without the courts the Constitution and laws have little value. On the one hand, Ukrainian courts, including the Constitutional Court suffer from corruptionї. On the other, the judiciary has yet to become free of direct external interference.

All of this leads to the law not being above us, but subject to human whim, which effectively prevents Ukraine becoming a law-based State. Judicial reform thus remains very much on the agenda.

5. New urgency has been given to the issue of adherence to the Constitution and laws of the land by the President, Speaker of the Verkhovna Rada, Prime Minister, Head of the Central Election Commission, the Head of the Constitutional Court, the Prosecutor General and the Human Rights Ombudsperson. One sometimes has the feeling that our politicians and public officials are really trying to «privatize» the legal system of the country. it is clear that such attempts demand response at the constitutional level and that legal mechanisms need to be created to bring such offenders to answer.

6. Since the law can act as regulator only in conditions of *equal treatment* of all involved, the practice in Ukraine of applying it selectively is dividing the nation and presenting a direct threat for society. It is therefore necessary to abolish as swiftly as feasible illegal «bonuses» and privileges of the political elite, to stop giving out State-owned flats in the capital to National Deputies. Other measures needed include establishing an average European spread of salaries in the State sector, restricting deputy immunity to what is objectively required.

7. Given the political events of 2006-2007 it would appear that Ukraine has still not freed itself of the results of the long years of communist rule. This suggests the need for a review of government policy in the areas of culture and education. Radical changes are required in the structure of government spending, with an increase in the amount spent on science and education. Ukraine must become more open to the world, a better educated and politically honest law-based state. This demands the continuation of public discussion on defining and crystallizing true priorities and values for the Ukrainian political community.

THE ENVIRONMENTAL AND HUMAN RAMIFICATIONS OF THE CHERNOBYL DISASTER[1]

2006 marked the twentieth anniversary of the disaster at the Chernobyl Nuclear Power Plant[2] The disaster has been called one of the greatest tragedies of the Ukrainian people in the XX century, together with the Terror of the Civil War and of Stalinism, Holodomor [the Famine of 1932-1933], two World Wars and the War in Afghanistan. At the same time, it would be impossible not to note the difference between this disaster and any other tragic event. Both the causes and the consequences of the Chernobyl Disaster are complex and varied, touching on all aspects of human life. The danger of Chernobyl is imperceptible, its manifestations and risks virtually unbounded, and these linger and will remain with us. The British writer Mario Petrucci, author of «Hard Water: a poem for Chernobyl» commented that «Chernobyl introduced the concept of a disaster of the future».

Despite a fairly large flow of different types of information about the Disaster, it has still not been entirely grasped. One feels that neither society and those in authority in Ukraine, nor those beyond it, have drawn definite conclusions as to what exactly happened on 26 April 1986 at the power station, how these events influenced the life of the present generation, the fate of the former USSR and what impact it will have on the right of future generations to live in a responsible, safe and truly harmonious society. It is precisely conclusions which could lead to changes in the behaviour of both the authorities and of society that have yet to be drawn, despite all the dramatic experience, and the large number of seminal publications, academic works and studies on Chernobyl.

It is generally recognized that the Chernobyl Disaster presents a multi-faceted, complex and long-lasting phenomenon which demands and will long continue to demand constant and long-term government, scientific and public efforts, sustainable strategic approaches and active public dialogue. As with any event of such a scale, there was no single cause for the Chernobyl Disaster. It was made possible through a series of mistakes and miscalculations of a political, managerial and technical nature. First and foremost, the danger of nuclear energy was underestimated. This led to decisions to build nuclear power stations in densely populated areas. We now know that in designing reactors of the Chernobyl type there were a number of miscalculations. There was, finally, the human factor with employees of the plant breaching instructions which were to have fatal consequences. In addition, the failure to inform people about the accident early on and the disregard for prophylactic measures led to a significant increase in the number of victims.

Many authors have pointed to the undoubted influence of the Chernobyl Disaster on the course of social and political processes in the former Soviet Union. The Chernobyl explosion was to a large extent the logical consequence to the unthinking pursuit of chimerical world

[1] By Oleksandr Stepanenko, member of the UHHRU Board and Head of the Chortkiv Environmental Organization «Zeleny svit» [Green World»]

[2] Чорнобиль should in fact be transliterated as Chornobyl. The world learned of this place and the tragedy associated with it in Soviet times, through the Russian Chernobyl. Given the scale of the disaster, this does not seem an appropriate place to argue for the more correct Ukrainian version, and we are staying with the more customary Chernobyl [translator]

ideological, military and technological domination, in the process of which human beings and nature were viewed as simply an unlimited resource and nuclear technology was seen as a means of shift victory.

The disaster which unfolded in an atmosphere of criminal secrecy, and soon directly affected millions of people, provoked long-term socio-psychological tension in society and a powerful desire for freedom of information and freedom of speech. This fully-fledged freedom of expression differed from that ersatz glasnost (openness) bestowed in doses from the offices of the Kremlin. From freedom of speech it was only a short step to motivated civic activity and the beginnings of spontaneous democratization in virtually all forms of public life. Here it's worth recalling that the first civic organizations which emerged in post-Chernobyl Ukraine were precisely those with an environmental focus (the Ukrainian environmental association «Zeleny svit» [Green World»), and after them humanitarian and cultural («Memorial» and the Ukrainian Language Society). Perhaps the most immediate focus in all these organizations' activities was the consequences of the Chernobyl Disaster.

Despite the truly colossal administrative, technological, financial and human resources poured by the then super-power into overcoming the catastrophe, no well-thought-out, rational and systematic use of these resources was in fact developed. For several years therefore there was no success in significantly minimizing the consequences of the Chernobyl Disaster. For many people then it became clear that such a tragedy could have happened and had such tragic consequences only in an extremely closed, uninformed and strictly regulated society which was therefore ineffective, unnatural and doomed to disarray.

It would however be incorrect to see the Chernobyl Disaster as a separate Ukrainian, or Soviet accident. Chernobyl brought to the surface a mass of unresolved issues in the world nuclear arena.

Chernobyl has a much wider dimension, at the level of civilization itself. The disaster gave stark focus to the contradictions inherent in the technocratic model of development with its typical primitive materialist view of progress, prosperity, development, the meaning of existence, with its artificial distancing of humanity from its natural roots, with all the disproportion at the level of human opportunities and responsibility, and with its vast imbalance between the recognition of spiritual and material values.

The Chernobyl Disaster sharply highlighted the contradictions between the human right to life and safety and the elemental realm in which all was allowed in the name of an ideological phantom, technological power and maximum profit. Chernobyl as it were brought us into a new history where the previously established concepts of «progress» and «decline», «far» and «near», «might» and «impotence» were shattered. It also placed in question the traditional models of production and consumption, the existing system of values and world view, and in the final analysis the civilization path of humanity.

Time, it would seem, removes us from the disaster, distance brings security. Yet nonetheless the still insufficiently understood paradox of Chernobyl lies in the fact that this distance is deception. Today the question is no less immediate than in 1986: «How are we to live after Chernobyl?»

THE SCALE OF THE RADIOACTIVE FALLOUT

As a result of the explosion, fire and exposure of the fourth reactor of the Chernobyl Nuclear Power Plant, an unprecedented number of radioactive isotopes were released into the environment. In scale and consequences for nature the accident surpassed all accidents at nuclear installations both before 1986 and since: the explosion, ensuing contamination of the territory and numerous victims at the «Mayak» plant in the Chelyabinsk region of the Soviet Union in 1957; the 1957 fire at a nuclear power plant [NPP] reactor at Windscale [now Sellafield – *translator*] in Britain; the 1979 meltdown of the active zone of the NPP reactor at Three Mile Island in the USA.

The Chernobyl radiation cloud spread over a considerable part of the northern hemisphere. If there really was a release of only 3% of the fuel (approximately 5 tonnes), then the world faces contamination by around twenty kilograms of plutonium. This amount is sufficient to cause the permanent and dangerous contamination of 20 thousand square metres of territory. If however 40% was expelled into the atmosphere, then the contaminated area could prove to be 10-13 times greater.

The consequences of Chernobyl are on a planetary scale in terms of space, and in time – on the scale of eternity. They are truly global since the radioactive substances from the destroyed reactor were dispersed through the entire planet. However divergent may be the assessment of the amount of radioactivity fallout from Chernobyl, the overall extent of the fallout was at least a hundred times greater than the force of the atomic bombs dropped on Hiroshima and Nagasaki in 1945. The consequences of Chernobyl are everlasting since the genetic modifications caused by the radiation may be passed on from generation to generation. And finally, the half-life of some of the radionuclides [isotopes] released into the atmosphere during the accident are between several dozen to several thousand years. For example, the half-life of plutonium is 24 thousand years, while caesium-137 and strontium-90 have a half-life of around 30 years.

The greater part of Belarus, 7% of Ukraine and the soil of 19 regions in Russia were severely contaminated with radioactive elements. The overall number of those affected in Belarus, Ukraine and the Russian Federation is close on 9 million. We know that as a result of radioactive material from the Fourth Reactor being released, more than 50 thousand square metres of Ukraine's territory was contaminated. A huge and constant source of isotopes to neighbouring territory comes from the Chernobyl [exclusion] zone, with an area of 2,598 square metres.

According to estimates from Ukraine's State Committee for Nuclear Regulation3 the total amount of radioactive waste in the exclusion zone (without the «Sarcophagus» and waste from removing the Chernobyl NPP from exploitation) is around 2.3 million м^3.

A huge amount of radioactive substances are concentrated on the Sarcophagus – the enclosure for the destroyed Fourth Reactor where the most urgent measures were taken to minimize the effects of the accident. According to recent estimates from the Ministry of Emergencies[4], the structure holds 200 tonnes of irradiated and fresh nuclear fuel mixed with other materials. The total activity of long-lasting isotopes is around 740x1015 Becquerel's. The sarcophagus has served as a protective enclosure for nineteen years and according to the State Committee for Nuclear Regulation assessment for 2005; its continued stability cannot be guaranteed. «a particular feature of the sarcophagus is its potential danger which is much higher that is permitted by the norms and regulations for constructions which house nuclear and radioactive materials. Sources of radiological risk are to be found in the radiation-contaminated water, material containing fuel inside the construction, contaminated soil and the stage of the buildings. From the point of view of radiation safety, it is effectively an open source of ionizing radiation which in its radiological characteristics is unique in the world and can be considered a temporary barrier for the protection of personnel, the population and the environment from potential danger.

There is an urgent need for maximum speed in transforming this structure into an environmentally safe system. According to conclusions reached by Ukrainian scientists as mentioned by member of the National Academy of Sciences I. Yukhnovsky[5], danger from the Chernobyl Nuclear Power Plant today is no less than at the moment of the explosion.

With activation of the flushing regime in the Kyiv reservoir there is a real danger that isotopes will be carried out into the Dnipro riverbed (approximate estimates suggest that there may be 90 million cubic metres of radioactive silt built up in the reservoir). The most contaminated territory

[3] «National Report on Nuclear and Radiation Safety in Ukraine in 2005». State Committee for Nuclear Regulation.

[4] « National Report on Manmade and Nature Safety in Ukraine for 2005». The Ministry for Emergencies and the Protection of the Population from the Consequences of the Chernobyl Disaster (http://mns.gov.ua/annual_report/2006/content_1.ua.php?m=B5&p=1

[5] Transcript of parliamentary hearings: «20 years of the Chernobyl Disaster» from 25 April 2006.

of the basin of the Prypyat river need to be protected from flood and spillage of isotopes into water objects.

2,295 populated areas of Ukraine, located on the territory of 77 districts of 12 regions have been officially recognized as contaminated with radiation as the result of the Chernobyl Disaster. More than 2.3 million people remain in officially recognized zones of radiation contamination, almost 500 thousand of whom are children. With the exception of the first three years after the accident at the Chernobyl NPP, for a long time the main active isotope has been and in the next few years will remain caesium-137 which constitutes 90% of the additional radiation exposure of the population living in contaminated regions. In total 441 thousand square metres were contaminated with contamination density from 4-10к Becquerel per metre[2] to 1480 Becquerel per metre[26] and more.

Through eating local food products, most of the people living on the contaminated area of Ukraine's Polissya have an additional dose reaching 90% of dangerous internal radiation. Statistics from Ukrainian medical institutions able to measure internal radiation show that the majority of residents of the contaminated area, including children, still have high levels of the radioactive elements caesium-137 and Strontium-90. This build up in the organism comes from regular consumption of local products like milk, potatoes, forest berries and mushrooms, as well as duck or geese, etc.

Member of the Academy of Agrarian Sciences B. Prister[7] produced contemporary statistics showing that 20 years after the initial contamination, 265 populated areas of Ukraine still have a level of caesium-137 in milk which is considerably higher than the State sanitary norm. Moreover in fifteen places this level has reached around 600-900 Becquerel (Bq) per litre (nine times higher than the norm!), while in another 45 places – 200-500 Bq. per limit. In 200 places there were levels of caesium which were higher than the sanitary norm. Maximum levels of food contamination presenting the highest dose of extra radiation are two or three, sometimes more, times higher than State sanitary norms. This is observed mainly in those areas where hayfields or grazing land for cattle are used despite having dangerously high radiological indicators.

Children in the most contaminated villages of Polissya where people are still eating local produce are receiving individual doses of radiation of 5-6 milizivert (for comparison, the maximum dose of radiation for professional personnel of nuclear power plants in Ukraine is 20 milizivert, with the actual individual dose being considerably lower, and with each occasion when the dose is exceeded being investigated by a specially authorized body). Forests, meadows and grazing land especially in the Polissya region where the level of radionuclides from the soil reaching foliage is much higher than in grazing lands and soil of other regions are the most dangerous areas from the point of view of radiation of all those which were contaminated as a result of the Chernobyl Disaster.

THE STATE OF HEALTH OF THOSE AFFECTED BY THE CHERNOBYL DISASTER

In the Law «On the State programme for overcoming the effects of the Chernobyl Disaster in 2006-2010», the Verkhovna Rada provides the following statistics about the present medical effects of radioactive contamination of Ukraine's territory.

As of 1.01.2006 there were 2,646,106 people who suffered as a result of Chernobyl in Ukraine. Of these 105,251 were in category 1; 276,072 – category 2; category 3 – 537,504; category 4 – 1,081,469; category G – 2,780: 643 030 children, including 4,520 orphans and 2,869 children with disability status. 2,054,685 people, including 472,191 children below 14 are living on territory

[6] National Report on Manmade and Nature Safety in Ukraine for 2005». The Ministry for Emergencies and the Protection of the Population from the Consequences of the Chernobyl Disaster (http://mns.gov.ua/annual_report/2006/content_1.ua.php?m=B5&p=1 (http://mns.gov.ua/annual_report/2006/content_1.ua.php?m=B5&p=1

[7] Transcript of parliamentary hearings: «20 years of the Chernobyl Disaster» from 25 April 2006.

contaminated by radiation. However a «State Register of people who suffered as a result of the Chernobyl Disaster» has still not been drawn up.

Assessments of the dangers from radiation are unclear in a number of areas. Most importantly, the effects of small doses are still not understood. According to the present theory, there is a linear relationship, without any threshold, between doses received and harmful impact. In other words, there is no safe level of radiation. However this risk from small doses can be hyper-linear, leading to relatively greater risk, or sub-linear, leading to relatively lower risk. Another area remaining unclear is in evaluating doses of internal radiation, that is, the effect on the organism of radionuclides which are ingested from food and the air.

According to figures from the Ministry of Health Medical Statistics[8], medical examinations of people affected by the Chernobyl Disaster found 83 percent were ill. The largest percentage of people in ill health were among the liquidators of the accident (91.5%); those evacuated from the exclusion zone – 87.7%; those living permanently on contaminated areas – 83.7%. Among children up to the age of 14 suffering as a result of the Chernobyl Disaster 83.7 were ill, while this figure was 76.6 percent for children living in contaminated areas.

The Ministry for Emergencies and the Protection of the Population from the Consequences of the Chernobyl Disaster[9] states that over the 20 years that have passed since the accident, 504,117 of those affected have died, 106,824 have received invalid status and suffer from illnesses linked with Chernobyl, while 2 million 23 thousand people are forced to live in areas contaminated with radiation.

The results of annual medical checks are finding that the number of people affected receiving clean bills of health is diminishing. Over the last four years the number of those still found to be in good health among the liquidators of the accident had fallen by two percent and came to 5.3 percent. Among children affected, 20.6 percent were in good health. The prevalence of illness among adults and adolescents had risen by 69.8 percent (from 12,354.3 in 1993 to 20,978.4 in 2004 per 10 thousand people affected, while actual illnesses had increased by 7.9 percent (from 5,306 to 5,731.6 per 10 thousand people affected).

Among those who took part in the liquidation of the accident a likely increase has been recorded in general illnesses, blood circulation disease and in malignant tumours. The highest figures are for liquidators who received doses exceeding 250 milizivert.

Since 2001 there has been the increase predicted by experts in cases of thyroid cancer among liquidators, as well as those evacuated and among the adult population of the contaminated territory. The number of cases of thyroid cancer among the adult population is expected to rise in the coming years. Over the first 15 years following the accident there was a trend towards an increase in the number of cases of leukaemia among liquidators. According to the Head of the National Commission on Radiation Protection of the Ukrainian Population Academician D. Hrodzynsky the accumulated doses of ionizing radiation have in recent times been spreading and varying their manifestations.[10]. As well as thyroid cancer among both children and adults, other cancers are appearing, for example, breast cancer. There has also been an increase in non-cancer illnesses. This has been particularly noted over the last six or seven years. Some diseases affecting different parts of the human organism have seen a 6 – 14 times increase over recent years. Liquidators who later had families had children born ill who in the second generation are having an even greater number of unhealthy children[11].

The level of disease and its incidence among children affected by Chernobyl living in the zone of heightened radiological control are significantly higher than among other children. The level of

[8] Ministry of Health Report on the work of the field in 2006.

[9] «National Report on Manmade and Nature Safety in Ukraine for 2005». The Ministry for Emergencies and the Protection of the Population from the Consequences of the Chernobyl Disaster (http://mns.gov.ua/annual_report/2006/content_1.ua.php?m=B5&p=1

[10] Material from the Humanitarian Forum «Regeneration, renewal and human development» 25 April 2006, Kyiv (transcript of the plenary and concluding sessions).

[11] The Other Report on Chernobyl (TORCH) An independent scientific evaluation of the health and environmental effects of the Chernobyl nuclear disaster., Berlin – Brussels.

disease has increased by 27.0 percent, reaching 1,383.5 per 10 thousand children in 2004 against 1,089.3 in 1993. There has also been an increase in the prevalence of disease by 59.0 percent – from 1,494 in 1993 to 2,375.4 in 2004. There are high levels of disease affecting the digestive organs, the nervous and bone marrow systems as well as connective tissue, skin and subcutaneous cells and genetic defects.

Another tragic consequence of the contamination from Chernobyl has been the sharp increase in the number of spontaneous abortions and stillbirths among women who were subjected to radiation. For some reason, which is still not fully understood, the organism of pregnant women rejects a foetus even after small doses of radiation. In the first five years after the Chernobyl Disaster in Belarus and the contaminated areas of Ukraine a four – five times increase was recorded in infertility and the number of stillbirths.

The most common reasons for chronic illness [invalidnist] among victims of Chernobyl include blood circulation diseases and malignant tumours. In 2004 figures for those first receiving invalid status were 2,614 per ten thousand of those affected by the disaster. In that same year 252 children first received such status. The main reasons among children are congenital abnormalities (160), tumours (47) and breathing disorders (10). These figures are rising relentlessly.

Increase in disease is accompanied by a fall in life expectancy. People who suffered as a result of the Chernobyl Disaster have been dying 20-30 years earlier than might have been expected. Mortality among liquidators of the accident in 1995 had begun to exceed the mortality rate among able-bodied members of the public overall, and from 1998 among able-bodied men in the population as a whole. During the period from 1999-2004, the overall mortality rate for liquidators of the accident from malignant tumours and blood circulation disease is likely to have exceeded the mortality rate for the population as a whole. The main causes of death among adults and adolescents were: blood circulation disease, cancers, and breathing or digestive organ disorders. Compared with previous years a particular feature in 2004 was the continuing increase in deaths from blood circulation disease (in 2000 – 2004 this was between 116.5 and 131.3 per 10 thousand people affected by the accident with the mortality rate for the entire population standing at 68.0 – 71.0), while the ratio among causes of death had reached 67.9 percent. This means that the number of deaths from blood circulation disease among victims of the disaster is almost double the death rate from this cause among the population as a whole. The number of deaths from diseases of the digestive tract has risen by 46.8 percent. The number of deaths from malignant tumours during that period remained virtually unchanged.

In view of this it is entirely logical to conclude that problems caused by the Chernobyl Disaster have not and indeed will not lose their immediacy. The rights of those who suffered as a result of the disaster, first and foremost, the right to health care must therefore remain the subject of constant monitoring by health and social protection agencies.

At the same time, the joint press release issued by the International Atomic Energy Agency and WHO[12] states the following: «About 4,000 cases of thyroid cancer, mainly in children and adolescents at the time of the accident, have resulted from the accident's contamination and at least nine children died of thyroid cancer». The IAEA and WHO experts maintain that «Poverty, «lifestyle» diseases now rampant in the former Soviet Union and mental health problems pose a far greater threat to local communities than does radiation exposure».[13] They believe that an increase in illness among the population is linked to the transitional period for the economy, with changes in the demographic situation and the socio-psychological state. They give an analysis of the ineffectiveness of measures for overcoming the early and further-removed negative factors of the Chernobyl Disaster, the low level of medical care, insufficient knowledge in the area of radiation medicine by bodies of local self-government, medical and educational personnel working on areas contaminated by radia-

[12] Environmental Consequences of the Chernobyl Accident and Their Remediation: :Twenty Years of Experience Report of the UN Chernobyl Forum Expert Group «Environment» (EGE); Health Effects of the Chernobyl Accident and Special Healthcare Programmes: Report of the UN Chernobyl Forum Expert Group «Health»

[13] Health Effects of the Chernobyl Accident and Special Health Care Programmes http://www.who.int/ionizing_radiation/a_e/chernobyl.pdf

tion. They claim that changes in the state of health are caused not so much by radiation, as by the influence of unfavourable factors not linked with radiation: a deterioration in conditions and food, long-standing emotional and psychological stress and other negative factors of the contaminated environment.

Despite this, most Ukrainian doctors and scientists are convinced that the leading negative factor influencing the state of health of groups of the population living in contaminated areas is specifically radiation of the thyroid and the yearlong internal effect of small doses of radiation.

SOCIAL AND ECONOMIC CONSEQUENCES OF THE DISASTER

The Chernobyl Disaster brought major change to the lives of millions of people. More than 162 thousand people were evacuated and moved from their homes. The resettlement created a whole range of serious problems linked with difficulties in adapting to new conditions. it led to a breakdown in support structures, restrictions in agricultural activities, the loss of jobs, a rise in unemployment and an escalation of other social problems. Demographic indicators for the area contaminated by radiation have worsened: the number of births is falling while the mortality rate is on the increase. The able-bodied members of the population are moving to areas less contaminated. . In addition, the attitude of people living in uncontaminated areas to produce from the areas affected by the accident makes it difficult to sell it which first of all leads to a reduction in local income. As a result the economic position and welfare level of those regions have deteriorated. The poorer quality of nourishment, conditions of work and relaxation have adversely affected people's state of health.

Restrictions in the types of activities which are traditional for those areas create problems in everyday life. A part of the population doesn't trust the information regarding effective measures for overcoming the consequences of the accident, the safety of the present radiation situation and concentration of radionuclides in food products, and is full of anxiety about their health and that of their close ones. Protection of the population via resettlement in uncontaminated areas proved less effective than expected due to its having been carried out too late. Planned back for 1991-1992, it has still not been fully implemented.

According to experts from Greenpeace International[14], «The Chernobyl Disaster destroyed the lives of whole groups of the population in Ukraine, Belarus and Russia. A combination of such factors as weak health, rising prices for medical care, resettlement, the loss of agricultural land, contamination of food products, economic crisis, spending on restoration measures, political problems and a lot more are creating the conditions for a major crisis».

ACCESS TO INFORMATION REGARDING THE CONSEQUENCES OF THE CHERNOBYL DISASTER AND THE SAFETY OF THE NUCLEAR INDUSTRY

Research carried out by analysts from the UN Development Programme (UNDP)[15] and the authors of the above-cited Alternative Report on Chernobyl (TORCH) shows that those affected by the Chernobyl Disaster are not being provided with clear information about the accident's impact on health and the environment. This has been and remains one of the main causes of social and psychological stress. This is hampering the development of the areas affected.

There is a tangible need for the following types of information:

♦ Constructive information about various aspects of the consequences of Chernobyl (radiological, medical, environmental, socio-economic,) which need to be systematically and widely circulated among the public;

[14] «For whom the bell of Chernobyl tolls», Greenpeace International Press Release on 18 April 2006, presenting the findings of their report «The Chernobyl Catastrophe. Consequences on Human Health» marking the twentieth anniversary of the accident at the Chernobyl Nuclear Power Plant, Kyiv.

[15] Assessment and analysis of the population's need for information about the consequences of the Chernobyl Disaster. Research in Ukraine, UNDP. 2004

- Information which will help people to rationally set about building their lives;
- Practical information about the radiological consequences of Chernobyl, the level of contamination of arable land, water, forests and food items. This information must be available to all members of the community so that each person can know the real level of food contamination, which grazing land can be used in order to get uncontaminated milk, where it's safe to gather the harvest;
- Information about ways of reducing the level of contamination of the environment and agricultural products which people produce and consume.

There is no system functioning in the contaminated areas, all of which are largely agricultural regions, providing information about the present risks and about safe behaviour. The local administration, specialists and the population as a whole are not informed about the present radionuclide and environmental situation in these regions, or about the health of the population.

There are traditionally problems with access to official information held by the central authorities with respect to the consequences of Chernobyl and nuclear safety. Almost all national reports from the Ministry are prepared and made public 1-3 years later.

For example, the last report available on the official website of the Ministry for Emergencies and the Protection of the Population from the Consequences of the Chernobyl Disaster is its «National Report on Manmade and Nature Safety in Ukraine for 2005».

The State Committee for Nuclear Regulation has published its own «National Report on Nuclear and Radiation Safety in Ukraine» also for 2005. We would note that the State Committee's report both in its structure and style, is aimed more at specialists of the nuclear industry than at members of the public. It states that: «In Ukraine policy on ensuring a proper level of nuclear safety is being carried out quite actively and efficiently.» As far as the safety of presently functioning nuclear power plants are concerned, the State Committee for Nuclear Regulation points to failings in the behaviour of the Nuclear Energy Generating Company Energoatom with regard to monitoring the state of the buildings of VVER − 1000 reactors.

The authors of this material do not have information from alternative sources regarding the safety of nuclear technology in Ukraine. From cases occurring over the last few years in CIS countries, only the cases of Sergei Kharitonov, a dissident and nuclear engineer from the Leningrad Nuclear Power Plant is unique, of public importance and well-known16. Kharitonov was essentially the only employee of Russia's civil nuclear industry who not only openly cooperated with environmental and human rights organizations − Zeleny Svit, Bellona, Greenpeace, but also dared informed the public about breaches of safety regulations at the station. From 1995 to 2004 both the Russian public and the international community had the chance to receive from source independent and professional information about the situation at the dangerous Leningrad Nuclear Power Plant. For the first time problems which had been kept concealed from the public regarding physical protection, behaviour with nuclear fuel safety standards, as well as the human rights situation, criminality and corruption at the plant, were made public. This gave the public the chance to have an impact on how these issues were resolved, and forced the authorities and the supervisory bodies to take measures to eliminate the shortcomings. Thus the activities of the «ethical informer» or whistle blower Kharitonov created additional opportunities for reducing the risk of accidents and other incidents at the nuclear power plant. In 2004 Sergei Kharitonov was fired and forced to seek political asylum in Finland. Unfortunately, lawyers from Belloni lost the suit in defence of Kharitonov's civil and labour rights in the Russian courts and in the European Court of Human Rights.

One can find on the website of Ukraine's Ministry for Environmental Protection the «National Report on the State of the Environment in Ukraine in 2004». This, in contrast to previous reports, does not have a separate section on nuclear safety and the consequences of the Chernobyl Disaster. As of the end of February 2007 there had been no sign of Ministry for Environmental Protection Reports for 2005 and 2006. Here it is worth noting that Article 251 of the Law «On protection of the environment» stipulates that there should be an annual report on the state of the environment.

[16] «ENVIRONMENT AND HUMAN RIGHTS» Bulletin of the Union «For chemical safety» (in Russian) (http://www.seu.ru/members/ucs) . Editor and publisher Lev A. Fyodorov. Report ECO-HR, 2392

Of all sources thus far mentioned, the official website of the Ministry of Health is the least developed and most impoverished from the point of view of information. The available information regarding the state of health of the population has not been updated for the last 3-4 years. There is no separate section devoted to the state of health of victims of the Chernobyl Disaster. Nonetheless, on 13.03.2007 a «Report on activities of the branch in 2006» was placed on this site. However neither the separate section on «Medical and sanitary professions for the population who suffered as a result of the Chernobyl Disaster and those working on constructions with a special work regime» nor any other section of the report contains an analysis of the state of health of victims.

It is far from always possible to obtain statistical information on public health via formal information requests (to the authorities).

Example 1. *The Ministry of Health treated the information request from «Zeleny Svit» № 04-03 from 02.03.2006 concerning the medical consequences of the Chernobyl Disaster as a formality, and effectively avoided providing the information requested. The Department of Radiation Safety and Medical Problems from the accident at the Chernobyl NPP within the Ministry of Health, in its response from 22.03.2006 instead suggested looking for the information requested in popular science publications from 1996, as well as in the Ministry of Health's collections of statistics. Among the latter, it mentions the reference book «The state of health of people who suffered as a result of the accident at the Chernobyl NPP», material from the Automated system of control of databases on the medical and demographic consequences of the Chernobyl Disaster, the National Cancer Register and the Register of Oncological Diseases, as well as the press release for the Parliamentary Hearings on issues around the anniversaries of the accident at the Chernobyl NPP. In fact, it proved impossible to read any of these statistical documents since not one was published on the Ministry of Health's official website.*

The collections of statistical data «Basic indicators of the state of health of the population and health care resources» which is prepared on an annual basis by regional departments of health according to method guidelines from the Ministry of Health at present do not contain a separate analysis of the state of health of people who suffered as a result of the Chernobyl Disaster nor demographic indicators for people living in contaminated areas.

Example 2. *Lviv human rights defender Volodymyr Prystula (Earth's Legions) sent information requests to the Department of Health of the Volyn Regional Administration. He asked for information about the state of health of those victims which the Law «On a National Programme for Overcoming the Consequences of the Chernobyl Disaster in 2006-2010» designates as in the group of those for top-priority medical supervision for the period up till 2010. This is, for example, people:*

– who have suffered severe radiation illness and liquidators of the accident who received a dose of more than 250 miligrey;

– who are suffering from oncological disease, autoimmune thyroiditis, leukaemia, and others, connected with radiation;

– participants in the liquidation of the consequences of the accident at the Chernobyl NPP in 1986-1987;

– those evacuated from the exclusion zone;

– children irradiated in the early iodine period (up to September 1985) who are living on territory contaminated by radiation;

The information request asked for answers to the following questions:

– what number of people who suffered as a result of the Chernobyl Disaster are presently living in the Volyn region?

– what number of people from the above-mentioned groups have been designated as requiring top-priority medical supervision for the period up till 2010 (separately for each category)?

– what indicators define the state of health of people assigned to the above-mentioned groups of top-priority medical supervision for the period up till 2010 (separately for each category)?

– What are the figures from 1986-2006 for illness according to the main groups of illnesses suffered by victims of the Chernobyl Disaster living at the present time in the Volyn region (in the first instance, children and compared with other categories of the population)?

The response from the Head of the Department I. Vashchenyuk deserves to be made public. «Your information request has been considered by the Department of Health of the Volyn Regional Administration. The information request contains formal questions which pertain to statistical reporting of the relevant government bodies and bodies of the Department. You can find the answer to your questions in official publications which are published by the corresponding departments. We are not obliged to prepare you from official publications information which is not secret or confidential. In accordance with Article 10 of the Law «On information» the government has created a mechanism for ensuring the right to information via the mass media, official publications issued by the authorities and the Department, as well as sites on the Internet.»

The manner described here of responding to information requests from civic groups may be considered a violation of Article 34 of the Constitution, Articles 5, 9, 28, 29, 32, 33 of the Law «On information», Articles 2 – 5 of the Aarhus Convention: Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Articles 4, 6 and 7 of the Law «On the Fundamental Principles of health care legislation in Ukraine», according to which the government guarantees all citizens their rights in the area of health care, including by means of organizing a State system of gathering, processing and analyzing social, environmental and special medical statistical information.

Finally, the annual Report of the Human Rights Ombudsperson with its section 6.2: «Protection of the rights of those who suffered as a result of the Chernobyl Disaster» is too general and non-specific, concerns events from 2003-2004 and was published in 2005. Over the last two years there have been no annual reports at all from the Human Rights Ombudsperson.

IMPLEMENTATION OF GOVERNMENT PROGRAMMES FOR MINIMIZING THE CONSEQUENCES OF THE CHERNOBYL DISASTER

Programmes to minimize the effect of the disaster have over many years placed considerable burden on Ukraine's State budget.

The fact that over these years it has been the taxpayers who have entirely paid for the consequences of the accident on a plant within the energy industry, and not the owner of the plant – Energoatom – is yet more proof of the dishonesty of the energy lobby when they claim that nuclear energy is «economical» and «safe». We would note that at the same time the Special State Budget Fund is financing the construction of new energy complexes of nuclear power plants and other measures envisaged by the Comprehensive Programme for the creation of a nuclear – fuel cycle in Ukraine.

In his address to the Parliamentary Hearings on 26 April 2006, the Deputy Minister for Emergencies and the Protection of the Population from the Consequences of the Chernobyl Disaster V. Kholosha[17] stated that just in the years since independence, 7.5 billion US dollars had been spent on overcoming the consequences of the disaster, on measures at the Chernobyl NPP and protection of the victims of the accident. However, even with this amount the available financial possibilities were only funding the basic Chernobyl programmes on average by 20%. At the same time, one was forced to note that over the last 14 years since Ukraine had been independently paying for liquidating the effects of the Chernobyl Disaster, the percentage of State expenditure spent on this had been steadily diminishing and in 2005 had come to less than 3% of State spending.

As a result, patients needing operations or other complex forms of treatment were waiting in the queue for years. Yet at the same time unwarranted concessions were being enjoyed by thousands of other people who had never lived on contaminated territory, had not directly taken part in liquidating the disaster, did not have illnesses caused through receiving doses of radiation, but had received them by virtue of their official position.

Over the 20 years since the disaster the government has not been able to set priorities in carrying out Chernobyl programmes and ensure an effective and transparent mechanism for their financing. The absolute majority of programme funds are directed at paying out concessions and

[17] Transcript of parliamentary hearings: «20 years of the Chernobyl Disaster» from 25 April 2006

compensation which are not always warranted. At the same time the percentage of funding for environmental rehabilitation projects for the contaminated areas stands at only around 3% of the overall expenditure.

An unjustifiably meagre part of the State budget is spent on health care programmes for the most vulnerable category of victims – children living in contaminated areas. Criminal money-pinching on people's health can be traced back to the first days of the Chernobyl Disaster. It is generally known also that the medical and government bodies in Ukraine, Belarus and Russia did not manage to organize the most vital, elementary and not in the slightest expensive measures for urgent iodine prophylactic treatment among the population of the contaminated areas. If the information about the release of radioactive isotopes into the atmosphere had not been kept secret for several weeks after the disaster, and if at least children had received iodine treatment during those first days, at least 4,000 cases of thyroid cancer could have been avoided. Adequate prophylactic measures against iodine deficiency among children living in Ukraine's Polissya and Podillya have still not been organized.

It would seem that Ukrainian high ranking officials have still not understood that the UN Convention on the Rights of the Child guarantee children inalienable rights in all circumstances. Therefore even in disaster conditions, children must have the same needs and rights as children in a safe environment. Despite repeated suggestions from the scientific and medical communities, a target programme «Children of Chernobyl» has yet to be developed. The need to recognize specifically this priority has been stressed on many occasions by the Ministry of Health, the representative office of UNICEF in Ukraine, the Rescue Fund for Children from Chernobyl, the International Association «Doctors of Chernobyl» and its President Member of the Academy of Sciences A. Nyahu.

Financial and organizational provisions and control over implementation of most government target programmes for minimizing the medical consequences of the Chernobyl Disaster are from year to year becoming less satisfactory.

For example, as responses to an information request from «Zeleny Svit» to departments of health in regional administrations show, according to the government programme «Comprehensive medical and sanitary provisions and treatment of oncological disease using high-quality medical technology», virtually all regions over recent years have been financed at a level 30% – 40% of that planned by the Ministry for Emergencies and the Protection of the Population from the Consequences of the Chernobyl Disaster. The percentage of financing from the region's application, that is, from more or less real needs is even smaller. As a result, the amount calculated for the «use of high-quality medical technology» per victim is on average 4.0 – 10.0 UAH per year and, taking into account rises in prices is showing a downward trend. Clearly, in such circumstances one is not speaking of quality medical checks, diagnosis and medical care for the above-mentioned category of patients.

Not enough is being done to attract money from private business and charities to support such steps. In this sense activity like the Children of Chornobyl Relief and Development Fund of Nadiya and Zenon Matkivsky, Oleksandr Kuzma and others who have for over 13 years been helping to provide clinics with equipment and medicine are rather the exception than the rule.

Nor indeed are any charitable missions able to significantly improve the efficiency of the healthcare system in the country which the government has over many years failed to find an integrated vision of reform and development for, and the problems which it lacks the political will to overcome. Reform of the health care system requires a responsible evolutionary approach taking into consideration a social situation that is fundamentally new from the legal, socio-economic, information and environmental point of view. Here it is worth beginning from a new vision of the role of the government and bodies of local self-government, the business milieu and civic society. Equally unacceptable are methods of strict administration and hopes that «sooner or later free economic mechanisms will sort it all out».

The next underestimated priority for implementing Chernobyl programmes is the issue of radiation safety in view of the consequences of the Chernobyl Disaster. The level of attention to this from the government can be seen in the state of implementation of projects to turn the Sarcophagus into an environmentally safe system and to withdraw the Chernobyl NPP from exploitation.

As reported by the State Committee for Nuclear Regulation[18], through the joint efforts of governments of the G8 countries, the European Commission and Ukraine back in 1997 the relevant plan for measures was drawn up. Financing of the project is from the country donors to the Chernobyl Shelter Fund and Ukraine. The Fund's administrator is the European Bank for Reconstruction and Development. According to the Law «On general principles for the further exploitation and withdrawal from exploitation of the Chernobyl NPP and the transformation of the destroyed fourth reactor into an environmentally safe system», the action plan envisages the construction of so-called «confinement», a protective structure containing equipment for removal from the reactor of material which contains nuclear fuel, and other systems aimed to carry out actions to ensure the safety of the personal, the population and the environment. Unfortunately, for a number of reasons the construction of this confinement is being dragged out. Urgent stabilization measures which the State Committee for Nuclear Regulation is insisting on are being implemented later than scheduled. Should there be a delay in building the confinement, the State Committee for Nuclear Regulation will insist on an additional 15 stabilizing measures which ensure reduction in the risk of the destruction of the building constructions of the Sarcophagus at any acceptable level.

Back at the beginning of 2004 the Cabinet of Ministers passed a decision on the need to seek opportunities for placing long-life radioactive waste created at the Chernobyl NPP into a temporary container. The time period for completing the construction of such a container – 22 October 2005 – was missed. Nor have changes in the design been agreed, and the State Committee for Nuclear Regulation has still not received a report analyzing the safety aspects of the temporary container. Delay in the implementation of the project and procrastination by the administration of the Chernobyl NPP on resolving issues concerning the safety of the container could lead to delays in carrying out preconstruction work on building the confinement. Looking for other options for storing the relevant types of radioactive waste will lead to additional radiation and financial risks.

Swift resolution is vital on issues regarding the safety for storage of hard radioactive waste. The situation has emerged where the construction of the container is already underway, yet the results of its inspection suggest that it does not meet safety requirements. It is entirely clear that the activities of the management at the Chernobyl NPP need to be appropriately coordinated and rationally supplied with the necessary funding from the State Budget or through international aid. This requires efficient relevant programme documents, approved by law, at all levels from the National and Comprehensive Programmes for withdrawing the Chernobyl NPP from exploitation and turning the Sarcophagus into an environmentally safe system to programmes for carrying out the stages of withdrawal from exploitation.

At the present time virtually all current programme documents at the Chernobyl NPP have ceased to be relevant with the time frame indicated hopelessly missed. All levels of such documents, therefore, need to be drawn up or reviewed in order to bring them into line with the real state of affairs and ensure effective further functioning of the enterprise. In the view of the management of the State Committee for Nuclear Regulation[19] the main priority must be to conclude drawing up, approving and bringing into force the basic programme documents of the «On general principles for the further exploitation and withdrawal from exploitation of the Chernobyl NPP and the transformation of the destroyed fourth reactor into an environmentally safe system» and the «Comprehensive Programme for withdrawing the Chernobyl NPP from exploitation».

ACTIONS OF THE HIGHEST-LEVEL AUTHORITIES IN UKRAINE IN THE CONTEXT OF THE 20TH ANNIVERSARY OF THE CHERNOBYL DISASTER

With the twentieth anniversary of the Chernobyl Disaster, certain efforts were to be observed to give priority to the question of its consequences and the development of the nuclear

[18] «National Report on Nuclear and Radiation Safety in Ukraine in 2005»,. State Committee for Nuclear Regulation.
[19] «National Report on Nuclear and Radiation Safety in Ukraine in 2005»,. State Committee for Nuclear Regulation.

industry. These came from the government, scientists and civic, especially environmental, organizations. The assessment of the disaster's effect differs according to the position taken by their authors.

At the end of 2005 the President issued Decree № 1726/2005 «On measures marking the 20th anniversary of the Chernobyl Disaster», which instructs the Cabinet of Ministers to analyze the situation with regard to overcoming the consequences of the Chernobyl Disaster in Ukraine, as well as to draw up and approve a plan of measures with regard to the twentieth anniversary. The Council of Ministers of the Autonomous Republic of the Crimea and the local State administrations are instructed to heighten attention to the everyday needs of those who suffered as a result of the Chernobyl Disaster, in particular improving their social and everyday provisions, seeking options for providing them with social support and material assistance. The Decree suggests that religious organizations in Ukraine hold memorial services for the victims of the Chernobyl Disaster.

In September 2005 the Law «On the procedure for taking decisions on the location, planning, and construction of nuclear installations and constructions designed for dealing with radioactive waste of State significance».

In our view, this law narrows the rights of citizens as far as decision-taking is concerned. For example, Article 2 of the Law states that decisions on the location, planning, and construction of nuclear installations and constructions designed for dealing with radioactive waste of State significance are taken by the Verkhovna Rada only after agreeing its location on their territory with the local authorities and bodies of local self-government. Article 3 reads: «decisions on agreeing the location **on their territory** of nuclear installations and constructions designed for dealing with radioactive waste of State significance shall be taken by the local authorities and bodies of local self-government after carrying out a local advisory survey of Ukrainian citizens (consultative referendum) on this issue». Thus the Law envisages participation in the decision-making process of only members of those communities on whose territory the nuclear object is to be located. The consequences of an accident at any nuclear plant, as Chernobyl demonstrated, can extend far beyond the borders of local communities or countries. Therefore decisions about such construction should be taken by all citizens who could suffer from a potential accident. Clearly the decision of a local community on whose territory nuclear reactors may be located can be significantly influenced by social and economic factors (money coming in from the State budget, and highly-paid jobs in the nuclear industry).

We would note that the previous Resolution of the Cabinet of Ministers from 18 July 1998 № 1122 «On approving Rules of Procedure fro carrying out public hearings on the use of nuclear energy and radiation safety» ensured the exercising of the right to take part in decision-making of all Ukrainian citizens via public hearings. In our view, the change in the format of participation to advisory surveys does not have much significance. After all neither the decisions of consultative referendums or advisory surveys, nor those of public hearings, have to be followed by the authorities.

As already mentioned, at the UN Chernobyl Forum in Vienna on 5 September 2005, the International Atomic Energy Agency (IAEA) and the World Health Organization (WHO) released their new report: «Chernobyl's Legacy: Health, Environmental and Socio-Economic Impacts». At the sixtieth session of the UN General Assembly on 24 October 2005б, where representatives of Belarus, the Russian Federation and Ukraine signed a collective resolution with the following content: *Noting the consensus reached among members of the Chernobyl Forum1 on the findings of the reports entitled «Environmental Consequences of the Chernobyl Accident and their Remediation: Twenty Years of Experience» and «Health Effects of the Chernobyl Accident and Special Health Care Programmes», and recognizing the important contribution made by the Forum to the overall assessment of the environmental, health, and socio-economic effects of the Chernobyl disaster,[20]» The UN Secretary General found reassurance in the findings of the Chernobyl Forum: «the Forum found no profound negative health*

[20] 60th Session of the UN General Assembly Strengthening of international cooperation and coordination of efforts to study, mitigate and minimize the consequences of the Chernobyl disaster

impacts on the exposed population as a whole and also no widespread contamination that would continue to pose a substantial threat to human health»[21]».

The first IAEA report (1990) on the consequences of the disaster at the Chernobyl NPP met with sharp criticism from the then Minister on Issues involving the Chernobyl Disaster H. Hotovchyts and representative of the Ministry of Health O. Vobylyova. Then following the publications of the next reports from UN structures, n particular, IAEA and WHO, Ukraine's authorities could already not manage to formulate their own well-argued assessment of the consequences of the Chernobyl Disaster. With the Report from IAEA/WHO in 2005, there was again silence from the Government, the Ministry of Health and the Ukrainian Academy of Medical Sciences.

Instead the IAEA/ WHO reports aroused criticism each time from the Ukrainian and international civic community for underestimating the real consequences of the Chernobyl Disaster. Serious arguments to suggest that the conclusions of the IAEA/ WHO experts on the medical and environmental consequences of Chernobyl do not reflect the true situation and could in fact be considered deliberate disinformation of the public were presented during the year in their publications and public speeches by such well-known and authoritative figures as Members of the Academy of Sciences O. Yablokov, V. Prisnyakov, D. Hrodensky, V. Komisarenko and A. Hyahu, as well as the experts M. Karpay, V. Uratenko and others.[22]

Here we should point out that in Ukraine statistical reports officially registered the consequences of the Chernobyl Disaster as including the following:

♦ Illnesses among those officially recognized as having suffered from the accident have risen by 28.3%; figures for overall mortality among victims has increased from 13.3 to 14.3, and among liquidators of the accident from 5.5 to 12.6 people (per thousand head of population);

♦ According to figures from the Ministry of Employment and Social Policy, 17,448 families received unemployment benefits due to the loss of a breadwinner as a result of the Chernobyl Disaster.

These indicators are objective since they refer to events which have already taken place and which are linked with the consequences of the Chernobyl Disaster. The question remains of analyzing the connection between the cause of death and those factors which contributed to it. The analysis of the state of health of the population living in areas contaminated by radionuclides, as well as of those who took part in the liquidation of the accident at the Chernobyl NPP, based on material from various medical institutions in Ukraine, Belarus and Russia unequivocally proved the adverse effect on health of the Chernobyl NPP. Up till 1990 in all cases an overall increase in illness could be observed, together with a decrease in the number of people in good health, a change in the range of symptoms, an increase in the severity of illnesses, and a decrease in the body's response to medication, etc. However it was only in a very small number of cases /that one could observe dependence between dose and effect. The reason for this was the low quality of information about doses and the specific features of internal radiation of victims' organisms which are of decisive important in the appearance of illnesses, yet are exceptionally difficult to provide quantitative assessment for.

On the other hand the IAEA/ WHO experts directly linked the medical prognoses with the average estimated individual and collective doses of external ionizing radiation. Using such methods it is intrinsically impossible to receive any other information than purely hypothetical figures for external radiation which are identical for all residents of a given district. This is because only figures of measurements of the force of a one-off and exclusive dose of gamma rays served as the basis for calculations. Yet to make medical prognoses on the basis of a virtual

[21] 60th Session of the UN General Assembly, Report of the Secretary-General: Optimizing the international effort to study, mitigate and minimize the consequences of the Chernobyl disaster:

[22] Mykola Karpan «Atomic energy can't wash itself clean from Chernobyl», «Dzerkalo tyzhnya», № 13 (592) Saturday, 8-4 April 2006. http://www.zn.kiev.ua/ie/show/592/53063/

Mykola Karpan «Revenge of the peaceful atom» http://www.zn.ua/3000/3320/56433/

Member of the Ukrainian Academic of Sciences Volodymyr Prisnyakov: «In vain Prometheus stole flame from the Gods» http://www.zn.kiev.ua/nn/show/598/53396/

«dose meter» is about the same as using figures for «the average temperature of patients around the hospital».

According to Volodymyr Usatenko, expert from the Ukrainian National Commission for Radiation Protection[23], in recent years the system of monitoring radiometric surveillance and laboratory control in Ukraine has been systematically destroyed and replaced by an analytical system for dose measurement certification for populated areas which is less representative and even less linked with people's individual doses. If one adds to this that demographic and epidemiological research in Ukraine has been carried out in total isolation from dose measures, one is forced to note that the basis for the freest interpretations of the consequences of the Chernobyl Disaster is now entirely in place.

In response to the above-mentioned IAEA/ WHO 2005 report, a group of independent British experts carried out new research on the medical and environmental consequences of Chernobyl[24]. The latter was presented from 23-25 April 2006 at the Kyiv conference «Chernobyl + 20: Remembrance for the Future», organized with the support of the Heinrich Вцll Foundation (Germany, the European Greens / the European Free Alliance, the Nuclear Energy Information Centre (USA), International Physicians for the Prevention of Nuclear War, Union 90 / Green Party (Germany). The international environmental organization Greenpeace also presented their assessment of the medical and environmental consequences of the Chernobyl Disaster at the conference»[25]. The theme running through virtually all the papers at the conference «Chernobyl + 20: Remembrance for the Future» was their rejection of the biased conclusions of the IAEA/ WHO «Chernobyl's Legacy: Health, Environmental and Socio-Economic Impacts». It was rather telling that the conference was ignored by the higher leadership of the country.

It is interesting that on 24 April, in the worst spirit of political correctness, another international conference was held in Kyiv: «20 years of the Chernobyl Disaster: conclusions and prospects», organized by the Government of Ukraine with the support of the European Commission, IAEA, WHO, the UN Development Programme, and with the participation of Ukraine's entire government and scientific beau monde, led by the President and the Speaker of the Verkhovna Rada.

It was hard to see as anything but hypocritical ritualized rhetoric the words spoken at the Parliamentary Hearings on 26 April 2006[26] of the outgoing Speaker of the Verkhovna Rada V. Lytvyn regarding the Verkhovna Rada's duty «*to protect its people, its society from manipulation which is being exercised by certain international structures under the pressure of the global nuclear lobby, those who on the eve of an increasing energy crisis plan to build hundreds of new nuclear reactors, to break free of the memory of Chernobyl, to arouse a kind of amnesia about the most massive technological catastrophe of the twentieth century. The Verkhovna Rada, together with the scientific and medical community, must put in their competent word regarding the inadmissibility of experts' speculations which were heard in 2005 at the UN Chernobyl Legacy Forum and aroused outrage in Ukraine. Experts at the Forum cited considerably exaggerated figures for human losses and stated that as a result of the Chernobyl Disaster around 4 thousand people have died or may die. At the same time more than 17 thousand families in Ukraine officially receive benefits due to the Chernobyl-linked death of the breadwinner of the family. Who should we believe? The highly qualified Ukrainian doctors who have seen the full depth of the people's tragedy, or some indifferent international bureaucrats and representatives of the nuclear and medical lobbies who want at any cost to downplay the medical and psychological consequences of the accident?*»

The Parliamentary Hearings on 26 April 2006 demonstrated the indifference of most Ukrainian parliamentarians to issues concerning the consequences of Chernobyl, with only a third of

[23] Commentary from Volodymyr Usatenko, expert from the Ukrainian National Commission for Radiation Protection on the Report of the UN Chernobyl Forum. «Chernobyl Project, 2005»: Kyiv, 2005p.
[24] The Other Report on Chernobyl (TORCH) An independent scientific evaluation of the health and environmental effects of the Chernobyl nuclear disaster, Berlin – Brussels 2006.
[25] Material from the international conference «Chernobyl + 20: Remembrance for the Future», Kyiv, 23-25 April 2006
[26] Transcript of parliamentary hearings: «20 years of the Chernobyl Disaster» from 25 April 2006.

all National Deputies attending. The degree to which Chernobyl issues are a priority fro the Ministry for Emergencies and the Protection of the Population from the Consequences of the Chernobyl Disaster was illustrated already by the fact that the Minister V. Baloha did not turn up to the Parliamentary Hearings. The Chair in one part of the Hearings, Vice-Speaker A. Martynyuk demonstratively interrupted the addresses given by the top authorities in the medical field D. Hrodzynsky, V. Bebeshko, A. Nyahu. Not therefore surprising that over the year that has passed since the Parliamentary Hearings, none of the numerous fundamental proposals aimed at establishing priorities for a permanent regime for overcoming the effects of the Chernobyl Disaster has been implemented.

In 2006, for example, no decision was taken on reinstating a single specially empowered central authority on overcoming the effects of the Chernobyl Disaster (the State Committee on Overcoming the Effects of the Chernobyl Disaster, created in 2004, was again disbanded by Presidential Decree in May 2005).

There was no summarizing and integrating document presenting scientifically founded data regarding the damage to health of various categories of the population caused by Chernobyl. Such a document should be presented at the international and national level as Ukraine's official position and as an alternative to the conclusions presented by those international institutions which deliberately downplay the consequences of the disaster. 13 years after the moratorium was removed from the development of nuclear energy, there is not only no single, Programme for the development of nuclear energy drawn up on a scientific basis, presented for public discussion and passed by the Verkhovna Rada, but no systematic and responsible national nuclear policy at all.

However, compared with spending in 2005 on social programmes for those who suffered as a result of Chernobyl, as well as on overcoming the effects of the Chernobyl Disaster, there was an increase in 2006 of 800 million UAH, with such spending from the State Budget amounting to 4 billion UAH. From 1 January 2006 sickness benefits for people who took part in the liquidation of the accident in 1086 were increased three and a half times, and two and a half days for liquidators of the consequences of the accident in 1987-1990. There was also a four and a half times increase in the size of the annual benefit to those who suffered from the accident. However the increase in prices for housing, medicines, and medical care means that the financing for the majority of social and medical programmes just on priority areas is only 10-20% of the amount needed. According to information from the Verkhovna Rada Committee on Environmental Policy, Use of Nature and Liquidation of the Consequences of the Chernobyl Disaster, the spending envisaged in the State Budget for 2006 for implementing the base Law «On the status and social protection of people who suffered as a result of the Chernobyl Disaster» is only 14% of what is needed. The Cabinet of Ministers and Verkhovna Rada are seeking a way out only by reducing the scope of the Law by withdrawing 1,551 populated areas in the fourth zone from the list of areas which suffered radioactive contamination.

Resolution of the problems linked with transforming the Sarcophagus into an environmentally safe system, as well as with managing radioactive waste, is being dragged out without any justification.

The notorious practice is continued year in, year out where the Law «On Ukraine's State Budget» suspends for that year the force of particular articles of other laws, including those which stipulate the procedure for exercising citizens' rights and having their interests considered. Such suspension is systematically carried out with regard to articles of the base Law «On the status and social protection of people who suffered as a result of the Chernobyl Disaster» and is manifestly unlawful. The practice runs counter to the Constitution where Article 22 states: «The content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws or in the amendment of laws that are in force».

Yet the Cabinet of Ministers and Verkhovna Rada could not even depart from this truly extraordinary and legally questionable practice in the year marking the twentieth anniversary of the Chernobyl Disaster, or in 2007. The Laws «On the State Budget for 2006» (Item 37 of Article 77) and «On the State Budget for 2007» (Item 30 of Article 71 and Article 97) suspended the force of

a whole range of the Law «On the status and social protection of people who suffered as a result of the Chernobyl Disaster»». These among other things define the scope of benefits and compensation for people in categories 1 – IV who suffered as a result of the accident, as well as the payment of pensions to victims. These restrictions relate, for example, to the provision of interest-free or concessionary loans – items 21 and 29 of Article 20 § 1; items 1 and 7 of Article 21 § 1; items 5 and 12 of Article 22 § 1; item 1 of Article 23 § 1; item 5 of Article 36 § 1; with regard to payment of compensation and assistance in amounts meeting the minimum wage – items 6 and 8 of Article 30 § 1, item 1 of Article 36 § 1; paragraphs 2, 3 and 4 of part 1 of Article 37; paragraphs 2, 3 and 4 of parts 1 and 2 of Article 39; Articles 40, 41, 44, paragraphs 2-7 of parts 1 and 3, paragraphs 2-7 of part 4 and part.7 of Article 48 of the Law «On the status and social protection of people who suffered as a result of the Chernobyl Disaster»

On 14 March 2006 the Law «On the State programme for overcoming the effects of the Chernobyl Disaster in 2006-2010» was adopted. One would note, however, the curious fact that this Law, and consequently the Programme itself, only came into force in 2007.

Animated public interest in issues related to the Chernobyl Disaster and the development of the nuclear industry, spurred by the events marking the twentieth anniversary, was short-lived. The political events of 2006, linked with the parliamentary elections, the creation of a ruling coalition and the ensuing battle between branches of power for domination in the highest echelons of power, as well as the discussions about two State languages, entry to NATO, etc artificially imposed on society, swiftly attracted public attention. We would note that neither in the programmes of the parties which were victorious at the elections, nor in the coalition agreements or the Memorandum of National Unity, was there any mention of priorities of environmental policy, environmental safety or of minimizing the effects of the Chernobyl Disaster

At the same time, in many Ukrainian printed publications and on television, commentaries appear regarding the UN report whose authors had «not noticed» the staggering discrepancies between the conclusions drawn by IAEA and WHO on the one hand, and official domestic statistics regarding the consequences, first and foremost bio-medical, of the Chernobyl Disaster, on the other. There was a particular rise in activity of the pro-nuclear lobby after the clash between Russia and Ukraine over the «gas war» in winter 2005-2006. Since then the mass media has been dominated by assessments and features which boil down to the conclusions that the scale of the Chernobyl Disaster has been exaggerated, and that in the twenty first century there is no alternative to nuclear energy.

LEGAL AND ETHNIC ASPECTS OF THE CHERNOBYL DISASTER AND THE DEVELOPMENT OF NUCLEAR ENERGY

In 1990 the Ukrainian environmental association «Zeleny svit» [«Green World»], using a group of lawyers led by Viktor Vovchenko, launched an independent civic investigation into the causes, circumstances and consequences of the Chernobyl Disaster.[27]. The results of the study were made public in 2004. Unfortunately, this was not made use of by the Verkhovna Rada Commission.

So that disasters like that of Chernobyl are not repeated, Ukrainian society and indeed humankind as a whole need to come to an ethical and legal assessment of the causes, circumstances and effects of the disaster. We need to understand how it was possible, what decisions, actions or omissions, led to it or increase its adverse effects. Conclusions are needed as to whether changes are needed in social relations, in the technical sphere, in the work of the public authorities and public officials, in safeguarding human rights. This assessment must be from all sides and objective. Neither the investigation carried out by the Soviet Prosecutor in 1986-1987, nor the subsequent court case examined by the Supreme Court of the USSR meet the demands for such objectivity and all-sidedness.

[27] Press release from «Zeleny svit» to mark the twentieth anniversary of the Chernobyl Disaster «From an independent Chernobyl investigation to an official Chernobyl court»

The independent civic investigation uncovered a number of important facts and circumstances with enormous importance for a legal assessment. The investigation begun in 1991 by the Prosecutor General after criminal proceedings were instituted against Shcherbytsky, Lyashko, Shevchenko and Romanchenko was terminated as being time-banned (under Article 49 of the Ukrainian Criminal Code). According to the results of the investigation, the accident was the result of an early termination of theoretical studies on the reactor's safety, on the basis of which the RBMK (a power plant with a graphite moderator and water coolant – *translator*) could have been deemed «a potentially dangerous reactor». The blame for this mainly lay with the heads of the country, the Academy of Sciences and the Ministry for medium-sized machine construction.

It is known that at closed meetings of the Soviet Politburo headed by Mikhail Gorbachev, starting from 29 April 1986, the consequences of the accident were discussed, and decisions taken regarding various levels of restricted information for the mass media, the Party, governments of countries in the West and those in the Socialist bloc. The first conclusions on the causes of the disaster were presented to the Politburo on 3 July 1986 already.[28] Thus, important conclusions regarding the reasons for the accident and those responsible were drawn at the very beginning and added to the official records of meetings. However these conclusions were designated for the highest leadership of the USSR alone, and therefore the protocols were produced with one copy only and this was given the stamp «Top secret».

The concept emerges at the same time of the moral liability of a huge number of people for the consequences of the Chernobyl Disaster. This applies in the first instance to high-ranking government officials in the USSR who had taken or agreed the decision to build a nuclear power plant in a densely populated area with not much water. A considerable part of the moral blame lies with the nuclear scientists and designers who convinced politicians that the nuclear power plants were totally safe and economical (we would note that even at that time there were alternative scientific conclusions available which argued that the development of number energy in Ukraine was dangerous and without prospects for the future). A great part of moral liability lies with those who in the first days after the explosion at the Fourth Reactor concealed the truth about the extent of the danger. Guilt must also be borne by officials of medical agencies who disregarded the need to carry out preventive and prophylactic measures to protect people's health.

The unique nature and seriously of the Chernobyl Disaster makes it impossible to rest without finally establishing the truth. The dispute remains unresolved between the constructors and the users of the plant on the direct causes of the accident. The actions of the highest-ranking officials have yet to be fully assessed – both during and after the accident. Only a public trial with full equality of arms, proper defence of the rights of the participants, as well as scrupulous observance of all procedure, can establish the truth. The ability to hold such a trial will prove to the international community Ukraine's sincerity with regard to its wish to be a law-based society.

In our view, an impartial and unbiased study uncovering the reasons and conditions for the Chernobyl Disaster is a matter of national importance, a test of national dignity and memory for our country. Those responsible for this tragedy will already not bear legal liability as envisaged by the law however Ukrainian society should provide a moral and ethical assessment of their actions on the basis of trustworthy information about what really happened in Chernobyl 21 years ago and who was to blame. Only the organization of a special investigative commission made up of scientists, politicians and leaders of civic society, provision of free access to information and the legitimization of their conclusions are the prerequisite for establishing the objective truth and reinstating historical justice.

The first arguments for nuclear energy being unacceptable from an ethical position were expressed at beginning of the «nuclear age» in the 1960s and 1970s by classic representatives of an environmental worldview.

[28] Alla Yaroshinskaya: «The Philosophy of nuclear safety» // http://www.zn.ua/3000/3320/56433/
Alla Yaroshinskaya: «The Dirty past not overcome (How the Politburo taught the press to lie about Chernobyl» http://www.rosbalt.ru/2007/05/10/295770.html

For example, the British environmentalist E. Schumacher spoke of the natural environment which had evolved over million years needing to be recognized as the definitive value. He asserted that a planet with more than 1.5 million species of plants and animals living in equilibrium could not be improved by unthinking and senseless human behaviour. He warned of the dangers of changing a complex mechanism without thorough investigation of all available facts. He recommended introducing changes in small doses to ensure that we understand the likely consequences of wide scale application. Where there was insufficient information, changes should be made on the basis of the laws and mechanisms of natural processes given that these have already demonstrated their ability to support life over a length period.[29]

One of the founders of the organization International Physicians for the Prevention of Nuclear War Helen Caldicott[30] believes that the dangers inherent in nuclear energy are unprecedented. She says that it is not just that nuclear energy is in itself dangerous, but that those working in the industry ignore the fact that highly radioactive waste is not destroyed. Some of its by-products will remain in the biosphere for thousands of years which will do irreparable harm to plants, animals and human beings. She believes that we have no moral right to leave such a legacy for future generations.

A number of cases are known where physicists or nuclear engineers have left the nuclear industry on ethical grounds. For example, in 1976 the nuclear scientists D. Bridenbau, R. Hubbard and H. Mainor explained their reasons for refusing to continue their work to the US Committee on Nuclear Energy: «We can no longer find any sensible justification for the fact that our everyday work will contribute to the accumulation of a radioactive burden for our children and future generations for hundreds of thousands of years». In their addresses to the Committee the specialists stated also that «just in themselves the defects and miscalculations in the plans for nuclear reactors present serious danger, and together with the shortcomings in the construction and exploitation of nuclear power plants, they make accidents inevitable. The question is only when and where». It seems appropriate here to quote also some leading Soviet nuclear physicists. Member of the Academy of Sciences I Kurchatov called a nuclear reactor a «smouldering bomb», while the Nobel Laureate L. Kapitsa described a nuclear power plant as «bombs which produce electricity».

The prominent Russian ecologist and correspondent member of the Russian Academy of Scientists A.V. Yablokov sees two levels of ethical problems in the context of the Chernobyl Disaster and the consequences for the development of nuclear energy in general.[31] He includes at the first level arguments of a general nature linked with the unethical aspect of scientific research in areas which are complicated by the difficulties of assessment, the inability to foresee results and the irreversibility of adverse effects. The second level involves arguments over practical application, the effects of the nuclear power plants' functioning and this also generates ethical problems.

The first ethical problem lies in the fact that nuclear energy is built on incomplete research and insufficiently tried out technologies, solely focused on economic comforts from the use of electricity. The nuclear energy lobby at the same time consciously endeavours to divert people's attention away from the numerous problems of nuclear technologies, the essence of which lie in the inability at any future point of neutralizing adverse consequences. These include the impossibility of controlling the formation of unstable isotopes in used nuclear fuel, the lack of economically acceptable ways of dismantling nuclear power stations and restoring the territory to its natural state, as well as the irreversible consequences of accidents with the release of radioactive substances into the environment. Finally, the risk of introducing nuclear experiments into practice cannot be fully estimated since it cannot be achieved within the span of one

[29] E.F. Schumacher: Both this and the next excerpt have travelled somewhat, being taken from translations into Russian and then translated into Ukrainian. Balking at the risk of the return to the English language being far removed from where they set out, the above texts are, we hope, fair summaries of what the authors actually wrote. (*translator).*

[30] Helen Caldicott: «Nuclear Madness» – see the above footnote

[31] Alexei Yablokov: The Myth that the consequences of the Chernobyl Disaster were minor – Moscow: Russian Centre for Environmental Policy 2001.

generation, or even several. Radiobiology and radiation medicine which have more or less been able to study the adverse effects of extreme ionizing radiation are still unable to give an answer as to what the later consequences will be of the radioactive contamination of the environment for humans and other living beings. However, without having ascertained these consequences, military and energy authorities have begun testing nuclear weapons and building nuclear power stations. In so doing they are violating the rights of the present and future generations by creating the threat of disease and genetic aberrations.

Through their very existence therefore, nuclear power stations breach the basic principles of environmental ethics encapsulated in «don't do harm» and «observe the rights of nature».

The next problem is that scientific elaborations in the area of nuclear energy are usually linked with those for nuclear weapons and are therefore extremely removed from scrutiny. The wall of secrecy over the sphere of nuclear technologies remains impenetrable. The limits of classified information here also extend not only to technological subtleties of the use of nuclear energy for military purposes, but also to issues of security of nuclear energy. This state of affairs significantly narrows the options for the public to be fully information, to take part in open public debate and to take responsible decisions on the development of nuclear technologies.

A difficult ethical clash is inherent in the fact that both nuclear energy and nuclear weapons are at the present time only available to a limited circle of countries in the «nuclear club» who gain real profit at both the economic and geopolitical levels. At the same time, the interests and risks to the people from other countries are not taken into consideration. Yet people in non-nuclear countries also share to a large extent the danger from the use of nuclear technologies. The Chernobyl Disaster equally convincingly demonstrated that accidents at nuclear plants are threats to all of humanity and all living nature, and it is impossible to overcome the global dangers of these threats through the efforts of one people or country eve if that country happens to be super-power. Full awareness of this situation gives rise to an ethical imperative: people who take strategic political decisions must rid themselves of a selfish perception of the world in satisfying government or private interests. They must take into consideration the rights and needs of people, of humanity as a whole and of future generations. Civic society in its turn must support equality of forces and interests in a democratic society and exercise control over the activities of financial –political groups who stand for the development of nuclear technology.

In A.V. Yablokov's view[32], «the Chernobyl Disaster demonstrated that the development of the nuclear industry violates fundamental human rights and freedoms. Since Chernobyl nobody can feel safe either within the four walls of their own home or in the most far-off corner of the Earth». In issues regarding the safety of complex modern technologies, including nuclear energy, the «human factor» becomes particularly immediate. Therefore however perfect plans for nuclear power plants are, they are constructed and used by human beings for whom it is natural to make mistakes. In the nuclear sphere these mistakes can have fatal consequences which many future generations will have to pay for. Over recent years the «human factor» has taken on particular urgency given the surge of international terrorism.

From an ethical and legal point of view there can be no justification for the customary practice in Ukraine whereby projects for the development of nuclear energy and the elimination of its adverse effects are regularly financed from the State Budget or via unjustified extra charges placed on electricity. We have the situation where, on the one hand the construction of new reactors for hydro accumulating energy stations, storage facilities for waste and used fuel, as well as measures to liquidate the effects of the Chernobyl Disaster are paid for by Ukrainian taxpayers. On the other, the taxpayers' opportunities for taking part in decision making on issues around the development of nuclear energy are reduced to a minimum.

The keys to resolving the entirely understandable «post-Chernobyl complex» with its lack of faith in the safety of the Ukrainian nuclear sphere can only be a politically responsible management, effective public control and active public dialogue. Without this there can be neither the necessary

[32] Алексей Яблоков. Миф о незначительности последствий Чернобыльской катастрофы. – М.: Центр экологической политики России, 2001.

mutual trust, nor effective management. The present relations found in the triangle: «nuclear energy – the authorities – society» is manifestly unacceptable.

The other reality is that no nuclear state can suddenly give up nuclear technologies and that would create exceptional added dangers. Ukraine too will have to bear the heavy burden of the problem of nuclear energy, at least for a fairly long time. However any branch must develop in a natural way and each step along this way must be well-considered and justified. The priorities of safety, caution, minimizing interference to the environment and rejection of the use of knowledge gained for military purposes must be absolute.

The Chernobyl experience teaches us that only a truly open and law-based society, one that is highly-educated and organized, bearing responsibility before its citizens, future generations and all humanity, can afford to develop in the nuclear sphere. Yet are there many countries in the modern world who really meet these standards?

THE OBSERVANCE OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I. THE RIGHT TO LIFE[1]

1. LEGAL REGULATION

Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms affirms the right to life and binds member states to protect it. This Article in the Convention occupies a particular place as was noted by the European Court of Human Rights (hereafter the European Court) in the Case of McCann v. the United Kingdom[2]:

It must also be borne in mind that, as a provision (art. 2) which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 (art. 2) ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime admits of no derogation under Article 15 (art. 15). Together with Article 3 (art. 15+3) of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. ... As such, its provisions must be strictly construed».

Article 2 of the Convention indicates that it is the duty of the State to not only refrain from unlawfully taking a life, but to also ensure that the national legal system guarantees the right to life. This requires the existence of a law prohibiting the deprivation of life and establishing criminal liability for the taking of a life. However, in addition, an effective system is needed of laws and public order, appropriate behaviour by the police, prosecutor, courts, as well as a system of punishments for crimes against life. The State's duties also include training the police and other enforcement bodies responsible for public safety in the reasonable use of force in compliance with domestic and international law.

Thus, in accordance with international standards, the State is responsible for the behaviour and omissions of its representatives, for example, law enforcement agencies, military servicemen, and prison personnel. However the State does not bear responsibility for the actions of private individuals who have taken another life. In all cases, though, the State is obliged to carry out an independent, swift and effective investigation into cases involving deprivation of life (positive duty). The State must also apply measures to protect life in the case of a real and urgent danger which it knew about or should have known about, for example, in cases involving manmade catastrophes or industrial incidents.

At the same time Protocol 6[3] to this Convention establishes the abolition of the death penalty, however «a state may make provision for the death penalty in respect of acts committed in times of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.»

On 28 November 2002 Ukraine ratified Protocol No. 13 to the European Convention on Human Rights[4] which prohibits the use of the death penalty under any circumstances.

On 16 March 2007 Ukraine ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights concerning the abolition of the death penalty.

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[1] Prepared by Volodymyr Yavorsky and Maksim Shcherbatyuk, UHHRU.

[2] Judgment of the European Court of Human Rights in the Case of McCann v. the United Kingdom, 27 March 1995

[3] Ratified by Ukraine through Law N 1484-III from 22 February 2000.

[4] Ratified by Ukraine through Law N 318-IV from 28 November 2002

It must be noted that the Convention does not define any framework for this right. Nothing is said, for example, about the moment when life begins and ends. The Convention does not accordingly clearly protect an unborn child. In contrast to Article 4 of the American Convention on Human Rights which envisages protection of the right to life as beginning from the moment of conception, in Article 2 nothing is said about time restrictions on the right to life, and there is no definition of «everyone» protected by the Convention. This issue has emerged at the present time in the context of laws on abortion, and there has not yet been any clear response as to whether the Convention protects the life of the unborn child. The European Court has stated that it cannot answer the question as to when the right to life begins, and therefore this question is up to domestic courts.[5]

It should also be noted that international standards do not define protection of the right to life in the context of minimum standards necessary for life. On 9 November 2006, in the Case of *«Voron v. Ukraine»* (№ 44372/02), the European Court rejected the claim that Article 2 of the Convention had been violated as the result of a low standard of living. It pointed out that according to its practice the Convention does not protect rights connected with standards of living (the Case of *Wasilewski v. Poland*, No. 32734/96, 20 April 1999). Furthermore, in this case the applicant did not prove how his circumstances endangered his life and that part of the application was rejected as manifestly unfounded.[6]

2. UKRAINE'S IMPLEMENTATION OF ITS OBLIGATIONS WITH REGARD TO THE PROTECTION OF LIFE

We can consider first information about the causes of death in Ukraine.

Causes of death in 2005 and 20067

	2006		2005	
	deaths	per 100000 head of population	deaths	per 100000 head of population
Total number of deaths	**758093**	**1620,3**	**781964**	**1660,0**
from the following causes:				
Some infectious and parasitic diseases	16063	34,3	17151	36,4
Among them, tuberculosis	10353	22,1	11963	25,4
viral diseases				
HIV	3995	8,5	3477	7,4
Tumours	90419	193,3	91873	195,0
Blood and Vascular disease, including:				
Problems with the immune system	328	0,7	383	0,8
Endocrinal diseases and digestive disorders				
Metabolism disorders	3206	6,9	3406	7,2
Psychological disorders	2823	6,0	3383	7,2
including				
Alcohol-related	2053	4,4	2524	5,4
Illnesses of the nervous system	6557	14,0	6675	14,2
Eye disease	2	0,0	–	–
Ear disease, growths	43	0,1	42	0,1
Vascular disease	481029	1028,1	488954	1038,0
Including alcohol-related	8033	17,2	8362	17,8
Respiratory disease	24775	53,0	28000	59,5
Digestive disorders	30262	64,7	31720	67,3
Including alcohol-related liver disorders	4043	8,6	4749	10,1

[5] The Right to life, prohibition against torture and inhuman or degrading treatment or punishment: European standards, Russian legislation and legal practice // General Editor: S.I. Belyaeva – Yekaterinburg, publishing company «Ural». 2005.

[6] The claim was similarly rejected in the cases of Pronin v. Ukraine (N 63566/00), Judgment from 18 July 2006

[7] The Demographic situation in Ukraine in 2006 Express-information from the State Committee of Statistics from 15 February 2007. Available at: www.ukrstat.gov.ua.

Skin and subcutaneous disorders	573	1,2	536	1,1
Skeletal and muscle system and				
Connective tissue	751	1,6	763	1,6
Diseases of the urinary and genital organs	3372	7,2	3579	7,6
Pregnancy, childbirth and post-natal complications	67	0,1	71	0,2
Specific conditions arising during:				
the prenatal period	1915	4,1	1789	3,8
Congenital disorder or defect				
Chromosomal anomalies	2175	4,6	2213	4,7
Unidentified or unspecified causes	29937	64,0	32120	68,2
External causes of deathi	63796	136,4	69306	147,1
Transport-linked accidents	9872	21,1	9889	21,0
Drowning, etc	3875	8,3	4184	8,9
Accidents involving smoke or fire	2548	5,4	2773	5,9
Alcohol-related poisoning	8024	17,2	9614	20,4
Accidental poisoning caused by:				
Other toxic substances	3456	7,4	3836	8,1
Deliberate self-harm	10004	21,4	10605	22,5
The results of an assault aimed at killing or inflicting injury	4145	8,9	4523	9,6

It is also worth analyzing the situation with regard to protection from unlawful deprivation of life, which can be seen from the following statistics on crimes against life.

The rate and types of general crimes[8]

			Registered crimes			Percentage of those solved %	
			2005	2006	changes %	2005	2006
Total number of crimes			440618	378294	-14.1	64.4	66.7
Incl.	Serious or especially serious crimes		197520	154857	-21.6	59.9	62.2
Modern types of crimes	Murder (or attempted murder)		3315	3220	-2.9	93.1	93.3
	Intentional grave bodily injury		5698	5283	-7.3	82.5	87.6
	including	Those resulting in a fatality	1866	1689	-9.5	87.2	90.3
	Unlawful deprivation of liberty or abduction		178	233	30.9	79.5	84.0
	Human trafficking		415	376	-9.4	85.4	84.3
	Rape or attempted rape		924	993	7.5	89.9	92.3

According to these figures the numbers of homicides has remained even, as have the number of such crimes solved. It is worth noting here that there are not just isolated cases where the police,

[8] Statistics from the Ministry of Internal Affairs http://mvs.gov.ua/ It should be noted that the figures for crimes solved are the numbers of criminal prosecutions reaching the court and resulting in a conviction, not the number of prosecutions ending with a verdict. If this figure is calculated with the latter, the overall number will be lower.

in order to maintain such figures, do all that they can to reduce the number of criminal investigations initiated over cases involving the taking of a life, and use any means to ensure that somebody confesses to such crimes.

It is also worth making a regional analysis of the statistics for this kind of crime. One sees that in some regions there is a significant increase in the number of crimes linked with the taking of a life, for example, in the Zhytomyr, Rivne and Mykolaiv regions, which shows the generally unsatisfactory work of the law enforcement agencies in those regions as well as the need for consistent work on improving the work of the police at regional level.

The number of crimes linked with deliberate murder, broken down by regions[9]

Regions and law enforcement departments	Murder or attempted murder				
	2005	2006	Rate of change, %	Percentage solved, %	
				2005	2006
AR of the Crimea	211	170	-19.4	95.0	93.4
Vinnytsa	77	66	-14.3	92.9	95.9
Volyn	51	43	-15.7	94.8	97.3
Dniepropetrovsk	240	229	-4.6	89.3	95.4
Donetsk	525	556	5.9	90.0	89.5
Zhytomyr	84	114	35.7	96.7	94.8
Transcarpathian	47	40	-14.9	95.5	89.5
Zaporizhya	149	156	4.7	91.3	89.9
Ivano-Frankivsk	35	24	-31.4	97.4	87.5
Kyiv	143	143		89.5	88.5
The city of Kyiv	139	129	-7.2	89.5	91.4
Kirovohrad	101	93	-7.9	95.2	93.7
Luhansk	206	206		94.3	97.4
Lviv	108	108		97.5	93.5
Mykolaiv	101	116	14.9	96.1	95.2
Odessa	219	213	-2.7	94.4	97.1
Poltava	108	91	-15.7	96.7	95.9
Rivne	26	35	34.6	100.0	97.1
The city of Sevastopol	32	31	-3.1	94.9	93.5
Sumy	85	81	-4.7	93.6	95.1
Ternopil	31	27	-12.9	96.3	93.8
Kharkiv	215	196	-8.8	92.9	95.6
Kherson	88	78	-11.4	93.2	97.5
Khmelnytsky	69	54	-21.7	98.8	96.8
Cherkasy	88	86	-2.3	88.0	86.4
Chernihiv	87	86	-1.1	97.2	90.3

[9] Statistics from the Ministry of Internal Affairs (MIA) . http://mvs.gov.ua/

Chernivtsi	40	34	-15.0	91.9	97.7
Total for MIA line departments [LD]	3305	3205	-3.0	93.1	93.3
Donetsk LD	2		-100.0	100.0	100.0
Lviv LD	1	2	100.0		100.0
Odessa LD		3			100.0
Prydniprovsky LD	1	3	200.0	100.0	100.0
South-West LD	2	5	150.0	100.0	100.0
Southern LD	4	2	-50.0	100.0	100.0
Total for MIA transport police departments	10	15	50.0	100.0	100.0
Total for the country	3315	3220	-2.9	93.1	93.3

According to international standards, in cases of acute need, law enforcement officers can take life without prior planning in order to prevent the escape of an offender or to protect any person from violence.[10]

The Ministry of Internal Affairs [MIA] report that firearms were uses by police officers in 61 cases in 2005, of which prosecutor's offices found 3 cases to have been unwarranted. Over the first 6 months of 2006 there were 21 cases, with 2 found unwarranted.[11]

It should be noted that in 2006 there were no recorded cases where the authorities or its representatives were guilty of politically motivated killings. During the year there were a number of killings of politically active businessmen or journalists, however given the way business, government and criminal interests are intertwined, it would be difficult to view these crimes as politically motivated.[12]

In this context, one would first mention the murder on 26 July 2006 of MIA colonel Roman Yrokhin. To this day the motives for this crime have not been established since the main role may have been played by business, political or criminal interests. Two versions are being considered: one of them works on the basic supposition of complicity by National Deputies who didn't want Yerokhin to delve into serious matters since he was involved in solving crimes connected with unlawful conversion centres laundering money in particular large proportions. The other version suggests business and criminal motives since Yerokhin could have possibly been connected with groups influencing the apportioning of land in the Kyiv region. The crime remains unsolved in the first instance as a result of the inaction of the Prosecutor in this matter.[13]

We would note that in 2006 not one of the most prominent murder cases was brought to a conclusion. There was no real progress in the case of the 2005 killing by police officers in Zhytomyr of a 36-year-old man whose identity has not been ascertained, who had been detained on a charge of petty hooliganism. The mass media inform that the Zhytomyr Regional Prosecutor has launched a criminal investigation against several (the exact number has not been indicated) police officers over «deliberately inflicting of bodily injuries» and «exceeding authority», however the case has reached no conclusion. The case involving the death of a person suspected of theft in Kherson also saw no progress in 2006.

There is still no conclusion to the Georgy Gongadze Case with numerous court hearings continuing since January 2006 and continuing in 2007. At these hearings a huge number of witnesses are questioned, with only around half the official witnesses having been heard by January 2007. Countless items of material evidence are investigated and various scenarios for the course of events are considered. It all appears however, more like a trial for the sake of a trial, than a

[10] Cf. Judgment of the European Court of Human Rights in the Case of Egri v.Turkey (1998).
[11] Letter from the MIA №34/С-46 from 03.01.06 in response to an information request: http://maidan.org.ua/static/news/2007/1168181350.html.
[12] Country Reports on Human Rights Practices – 2005 Released by the US State Department's Bureau of Democracy, Human Rights, and Labor, March 8, 2006.
[13] Material from the producers' centre «Zakryta zona. Sim Kul» [Closed zone. Seven bullets»]. http://www.zakrytazona.tv/ua/programs/zakrita-zona/teksti/service/sim-kul/

real attempt to solve the case. It was not for want of a reason that the Secretary General of the Council of Europe Terry Davis said that the CE's greatest disappointment had been over the lack of real progress in solving Gongadze's murder and that this would adversely affect Ukraine's reputation abroad.

There has been no significant progress into the investigation of the killing of Volodymyr Yefremov[14]. Procrastination in the criminal investigation has led to delays in submitting the case before the court. A considerable delay was caused in 2006 due to the carrying out of yet another forensic examination.

Nor was the case concluded in 2006 of the beating to death in a Kharkiv SIZO [pre-trial detention centre] of 21-year-old Armen Melkonyan. There were no sentences in the case involving the officers of the Ministry of Internal Affairs accused of carrying out killings, abductions, etc. According to information from the Institute of Mass Information, one of the respondents in this case was found during 2006 to be linked with the murder of an employee of the SBU [Security Service].

The single high-profile case which resulted in a court verdict was that into the death of Ihor Aleksandrov[15]. After more than six months of court hearings, on 7 July 2006, the Luhansk Regional Court of Appeal convicted 5 men of involvement in the killing of the journalist and sentenced them to periods of between 2 and 15 years imprisonment. Ihor Aleksandrov's family was also awarded compensation of 400 thousand UAH.

One must also mention the situation regarding the right to life in the Armed Forces. Despite the fact that there is an adequate legislative base for protecting this right, civic organizations receive information about cases of «didivschyna» [bullying or hazing of the new conscripts] including incidents with a fatal outcome. The military command and government provide somewhat different information about such cases According to a statement from Armed Forces General Serhiy Kirychenko 148 criminal investigations were launched over cases of «didivschyna» in 2006, and 18 soldiers were recognized to have been victims. At the same time, the Minister of Defence A. Hryshchenko in September 2006 stated that there had been 83 criminal investigations initiated, noting that not all such crimes are registered.

The Prosecutor General in August appointed a special check on adherence to laws protecting the life and health of military servicemen, preventing violence and violations involving «didivschyna». An analysis of the rate and type of crime in the Ministry of Defence over the last 7 months had revealed a negative trend with an increase in the number of crimes involving deaths, and an increase in the number of victims of crimes. From January to July 2006 41 people had died against 29 in the previous year, while 12 people had died as the result of a crime, as against 8 in 2005. In just three days in August 2006 another two conscripts (in the Poltava and Kyiv regions) died.[16]

An example of «didivshchyna» was seen in the beating to death of young conscript Oleksandr Rybka, by two more senior conscripts in the No 169 Infantry Training Centre «Desna» in the Chernihiv region. The autopsy showed that the cause of death was a ruptured liver caused by serious beating According to information from Oleksandr's relatives the two corporals had demanded money from him a day before the beating[17]. The Prosecutor General launched a criminal investigation. The «Desna» Training Centre gained notoriety the year before when during shooting practice the crew of one of the tanks aimed by mistake at a training corps. Two soldiers were killed and another had to have his legs amputated. The head of the centre and his deputy were dismissed over the tragedy.

The Minister of Defence acknowledges the existence of «didivshchyna», however believes that the problem is one inherited from the Soviet army «where it was almost always hushed up».[18]

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[14] The Dnipropetrovsk journalist died in 2003 in an extremely suspicious car accident. (*translator*)

[15] Ihor Aleksandrov had written a lot of hard-hitting articles about Donetsk politicians and about corruption in the law enforcement agencies. He was murdered in 2001. (translator)

[16] A check has been called into adherence to laws protecting the life and health of military servicemen // http://helsinki.org.ua/index.php?id=1156158688.

[17] The two corporals received heavy sentences when this case came to trial. More details can be found at http://www.khpg.org.ua/en/index.php?id=1187036175&w=Rybka and following the links at the bottom of the page [translator]

[18] http://www.khpg.org.ua/en/index.php?id=1164934219&w=didivshchyna

No less important an aspect of protection of the right to life is investigations into disappearances. In 2006 there was one case involving a journalist who disappeared[19]

Statistics show that abductions still do occur in Ukraine.

Table 3. The number of registered crimes lined with deprivation of liberty of abductions. A regional analysis..[20]

Regions and MIA line departments	Unlawful deprivation of liberty or abductions		
	2005	2006	rate, %
AR of the Crimea	17	13	-23.5
Vinnytsa	2	2	
Volyn	6	6	
Dniepropetrovsk	12	11	-8.3
Donetsk	10	21	110.0
Zhytomyr	2	8	300.0
Transcarpathian	7	6	-14.3
Zaporizhya	10	9	-10.0
Ivano-Frankivsk	2	4	100.0
Kyiv	5	7	40.0
The city of Kyiv	16	26	62.5
Kirovohrad	6	7	16.7
Luhansk	16	10	-37.5
Lviv	13	16	23.1
Mykolaiv	8	10	25.0
Odessa	10	16	60.0
Poltava	5	12	140.0
Rivne	1	3	200.0
The city of Sevastopol			
Sumy	4	8	100.0
Ternopil	1	1	
Kharkiv	7	8	14.3
Kherson	4	5	25.0
Khmelnytsky	4	8	100.0

[19] On 20 February 2006 journalist from Anatoly Kachurynets from the Striy newspaper «Homin Voli» («Sound of Freedom») left home and never returned. Although the journalist ran the newspaper section on criminal activities, the police say that there is no evidence that the disappearance was linked with his professional activities. The Western Information Corporation (an Internet publication) wrote that according to some reports, Mr Kachuryents had left a note for his wife. The latter has refused to discuss the disappearance [here and in the section on Freedom of Expression the text has been adapted in order to incorporate the information from the reports cited [translator]

[20] Statistics from the Ministry of Internal Affairs (MIA) . http://mvs.gov.ua/

Cherkasy	3	7	133.3
Chernihiv	4	3	-25.0
Chernivtsi	1	2	100.0
Total for MIA line departments [LD]	176	229	30.1
Donetsk LD			
Lviv LD			
Odessa LD	1		-100.0
Prydniprovsky LD		1	
South-West LD	1	3	200.0
Southern LD			
Total for MIA transport police departments	2	4	100.0
Total for the country	178	233	30.9

As already stated, in order to ensure the right to life, it is important not only to carry out investigations into crimes against life, but also to investigate deaths.

From time to time stories come out about medical mistakes and those who suffered as a result. Some of them have a fatal outcome. It should be noted that there is no law defending the interests of victims of medical blunders. However the main problem is not even in the fact that any specific article of the Criminal Code is difficult to apply because of the unclear or excessively narrow formulation of the provisions. A greater problem is that the Ministry of Health at one stage lobbied to have prerogative in carrying out expert assessments of medical activities whereas this should have been under the jurisdiction of the Ministry of Justice. Any expert assessment is carried out by the Ministry of Justice with only medical ones for some reason left to the Ministry of Health. After all those accused or suspected of an offence cannot check themselves. If you then add the closing of ranks, it is easy enough to predict the court prospects of such cases.

The problem of infant mortality (in the first year of life) and child mortality (up to the age of 18) remains serious. The Deputy Minister of Health, Viktor Veselsky, has himself stated that these mortality rates are continuing to rise.[21] The importance of this problem was indicated by the special meeting held at the Ministry of Health. The increase in infant mortality was confirmed and broken down into different regions for the first six months of 2006. With an average for the country of 10.12 deaths per one thousand babies born, in the Zhytomyr region the figure was 14.79, in the Kirovohrad region – 13.98, the Chernivtsi region – 13.26 and Luhansk region – 12.87.[22]

Infant mortality in Ukraine[23]

	The number of infants up to the age of one dying		The number of infants up to the age of one dying	
	2006 *(infants)*	**2006 (per thousand born alive)**	**2005 (per thousand born alive)**	**2005 *(infants)***
Ukraine	**4433**	**10,1**	**10,1**	**4265**
The AR of the Crimea	197	10,4	9,0	161
Vinnytsa	150	9,6	9,1	139
Volyn	104	7,9	8,4	105

[21] V.V. Chornomorska: Rising infant and child mortality in Ukraine: the Ukrainian Medical website Hypocrites www.hippocrat.com.ua/publicism/death-rate/

[22] M. Bernyk, S. Ternova: Last place can prove shameful // Your health № 28 (855) from 22-28 July 2006 http://vz.kiev.ua/med/28-06/2.shtml

[23] The Demographic situation in Ukraine in 2006 Express-information from the State Committee of Statistics from 15 February 2007. Available at: www.ukrstat.gov.ua

Dniepropetrovsk	345	10,9	10,2	309
Donetsk	427	11,4	11,7	412
Zhytomyr	149	11,3	9,5	123
Transcarpathian	157	9,8	11,8	183
Zaporizhya	168	10,2	11,2	177
Ivano-Frankivsk	166	10,8	13,0	194
Kyiv	162	9,6	7,7	123
Kirovohrad	127	13,6	11,0	100
Luhansk	240	12,7	11,9	210
Lviv	211	8,0	8,4	218
Mykolaiv	99	8,8	8,2	89
Odessa	275	11,3	10,8	254
Poltava	94	7,4	8,8	103
Rivne	148	9,8	10,5	152
Sumy	77	8,2	11,4	102
Ternopil	109	9,7	8,9	98
Kharkiv	182	7,8	10,3	229
Kherson	110	10,3	11,4	115
Khmelnytsky	156	12,1	8,8	109
Cherkasy	113	10,3	10,5	108
Chernivtsi	134	13,5	12,6	124
Chernihiv	83	9,2	11,7	103
Kyiv (city)	226	8,4	7,6	197
Sevastopol (city)	24	6,5	7,7	28

Causes of death of infants up to the age of one[24]

	2006		2005	
	infants	Percentage of the total	infants	Percentage of the total
Total number of deaths	**4433**	**100,0**	**4265**	**100,0**
from the following causes:				
Some infectious and parasitic diseases	204	4,6	193	4,5
Among them, tuberculosis	2	0,0	4	0,1
viral diseases				
HIV	21	0,5	33	0,8
Cancer	45	1,0	45	1,0
Blood and Vascular diseases, including:	41	0,9	41	1,0
Problems with the immune system				
Endocrinal diseases and digestive disorders	59	1,3	59	1,4
Nervous system disorders	127	2,9	115	2,7
Vascular disorders	62	1,4	71	1,7
Respiratory disorders	170	3,8	179	4,2
Including influenza and pneumonia	120	2,7	110	2,6
Digestive system disorders	26	0,6	30	0,7
Specific conditions arising at the prenatal stagei	1915	43,2	1789	41,9
Including heart or vascular disorders in the prenatal stage	961	21,7	890	20,9
Specific prenatal infections	393	8,9	360	8,4
Haemoglobin linked disorders in the foetus or new-born baby	306	6,9	294	6,9
Congenital development disorder or deficiency and				
Chromosome anomalies	1221	27,6	1206	28,3
Including congenital disorders of the				

[24] Ibid

Nervous system	123	2,8	139	3,3
Congenital vascular problems	517	11,7	475	11,1
Congenital problems of the digestive system	81	1,8	73	1,7
Other illnesses	5	0,1	5	0,1
Unspecified or unknown causes of death	222	5,0	186	4,4
External causes of death	336	7,6	346	8,1
The results of an assault aimed at killing or inflicting injury	26	0,6	20	0,5

In order to understand the magnitude of the problem, we can take the Zhytomyr region where in 2006 a check was carried out of infant and maternal mortality rates by a special commission set up by the Ministry of Health. The conclusions were not cheering. Over 5 months of 2006, the mortality rate of infants under a year old had risen by 25.7% in the region as compared with the previous year. This level is double that of the average around the country. Among the causes of death were breathing difficulties, injuries and accidents with the latter highlighting considerable problems in the organization of medical care for mothers and their babies. The overwhelming majority of cases where infants died between 28 days and one year were registered in rural areas (70%). This indicates inadequate work in medical and social preventive care and regular medical check-ups of young children in rural areas. In the first month of life, the main cause of death is congenital defects which were not detected by a scan. In maternity wards in the region there were 5 deaths in the second and third weeks of life, which suggests that the stages for organization of medical care for newborn babies were not being observed properly. There are also problems with equipment in maternity wards in the districts and cities of the region. Only 8 of the 23 wards have respiratory equipment for newborns babies; there were no well rooms in three maternity wards with between 150 and 170 births a year; only 8 hospitals had foetal monitoring equipment. There were problems in the region with finding neonatal specialists and paediatricians, particularly in small and far-off districts. Overall in the region the following posts were vacant: 153 paediatrician jobs; 49 – midwife-gynaecologists; 15 – neonatal specialists and 21 child anaesthetists. In district treatment and preventive medicine institutions there were shortcomings in the system for monitoring pregnancies these concerning the comprehensiveness and quality of examination, consultation, treatment, timely hospitalization according to the protocols and levels for medical assistance.[25]

Another indicator is also showing an increase each year, this being the number of women dying during childbirth. For example, in the Luhansk region where another special committee from the Ministry of Health worked, it was found that in 5 months of 2006 the indicator for maternal mortality was 50.7% (4 women died, as against one death in 2005). This suggests serious failings in the organization and quality of medical care provided to pregnant women, women who are giving birth or who have done so recently, both in-patients and those treated on an outpatient basis.

There are virtually identical problems in every Ukrainian region, indicating the scale of the problems which Ukraine must address. Statistical data indirectly shows also that at the local level there is concealment of actual data or manipulation of the figures (for example, by «slipping» infants into a different weight group, weighing them incorrectly, etc). There are also such obvious problems as inadequate professional training of staff on health care for mothers and their babies, staff shortages, especially in rural areas, a lack of a systematic approach to resolving the problems in the field and providing for its material and technical needs. Instead of real plans, vague programmes are put forward, general methods instead of a specific analysis of the shortcomings in order to immediately address them, and abstract noises on the subject of why it is all bad. The instalment of new technology is limping along painfully, while the heads of health care bodies cannot find time to cooperate with the local authorities and bodies of local self-government, or with the law enforcement agencies. It needs to be recognized that the problem of child mortality has already ceased to be a merely medical problem and become an issue of the protection of the right to life.

[25] M. Bernyk, S. Ternova: Last place can prove shameful // Your health № 28 (855) from 22-28 July 2006 http://vz.kiev.ua/med/28-06/2.shtml

3. RECOMMENDATIONS

1) Introduce effective independent mechanisms for investigating deaths, especially those caused by the actions of law enforcement officers

2) Change criminal procedure legislation in order to provide more rights to victims, including to the families of those killed, and to increase their impact on the course of the investigation

3) Publish an annual report on investigations into crimes against life, with specific regional features identified

4) Pass a Law «On patients' rights» providing safeguards for the observance of patients' right to life.

5) Ensure the availability of independent forensic medical examinations for assessing causes of death

6) Introduce proper mechanisms for ensuring adherence to legislation in the work of the law enforcement agencies, as well as appropriate government and public control;

7) Carry out reforms into health care aimed at reducing infant and child mortality.

II. THE RIGHT TO PROTECTION FROM TORTURE AND ILL-TREATMENT[1]

1. OVERVIEW

As a party to the International Covenant on Civil and Political Rights, UN Committee against Torture and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Ukraine has taken on the commitment to ensure that people are not subjected to torture and ill-treatment by public officials. This right is absolute and there are no circumstances justifying the use of torture. The right is enshrined in the Constitution, Article 28 of which guarantees: «No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity». At the same time, human rights organizations continue to deal with allegations of torture and ill-treatment quite frequently.

The problem of torture is one of the most difficult to resolve. Its roots like in the formula used by Vyshynsky that «a confession is the queen of proof», in the attitude towards an offender as to an enemy you don't need to be on ceremony with and in general cruelty in society, with a failure to appreciate the value of each human life. There is a fixed idea among the public that any, sometimes harsh, methods are acceptable in order to eradicate crime. The investigation into a large percentage of crimes is based on the confession of the suspect. Therefore, regardless of declarations about commitment to human rights, the legislators and the courts are reluctant to change entrenched practice and legislation. This is not effective enough at avoiding the use of torture and it also fosters the right conditions for a high level of latency with regard to this crime. The latter makes it positive to present the problem both to Ukrainian society and to international institutions and the international community as minor. Unfortunately, ill-treatment or torture often remain unpunished, or worse, are treated as the norm.

The following remain forms of torture and ill-treatment of a widespread and systematic nature:

- **the use of torture against those suspected of having committed a crime during the detective inquiry stage or pre-trial investigation;**
- **the conditions and ill-treatment meted out in pre-trial detention centres [SIZO], temporary holding facilities [ITT] and some penal institutions;**
- **«didivshchyna» [hazing or bullying] 2in the army when more senior servicemen torment and humiliate young soldiers;**

Over recent years, however, there has been a change in the attitude of the management of some government bodies implicated in the use of torture.

The Ministry of Defence, for example, has adopted a principled stand in carefully investigating all complaints and cooperating actively with human rights organizations which are able to

[1] Prepared by Arkadiy Bushchenko, lawyer and legal expert for KHPG on Criminal Process and the European Court of Human Rights and Yevhen Zakharov, Co-Chair of KHPG and Head of the Board of UHHRU

[2] In the following the official term is occasionally used – nestatutni vidnosyny – unfitting or inappropriate relations. Given that the most common term «didivschyna» is already unfamiliar to the English reader, we have used this everywhere (*translator*)

visit military units, meet with solders and officers, and carry out surveys, etc. Thanks to this, from 2002 – 2006 we observed a reduction in the number of cases of «didivshchyna», as compared with the period from 1998 to 2001. Although cases do still occur, over recent years there have almost not been any killings or cases where soldiers committed suicide as the result of «didivshchyna».

The adoption on 4 April 2006 of a new version of the Law «On general military conscription and military service» made a significant change with direct impact on «didivshchyna». The period of military service in the Armed Forces was reduced from two years to one and in the Naval Forces to 18 months. With this change, the divide between soldiers from the first and second year of their service disappeared. One can still see lighter forms of «didivshchyna», as when conscripts who have served six months already treat beginners with contempt. The number of criminal investigations over «unfitting relations» [the official term for «didivshchyna»] has fallen sharply, although it is extremely difficult to eradicate the problem. The following is a typical case.

According to the sentence passed by the local military court of the Sevastopol garrison, conscript VCh-AO428 sailor Prokhurenko, in order to demonstrate his imagined superiority over a conscript who had been called up later, and kicked Udin and Dubyn so hard that Dubyn suffered serious bodily injury as a result of which he had to have his spleen removed. The court sentenced Prokhurenko to two years in a disciplinary battalion, however refused to allow Dubyn's claim for 5,000 UAH in compensation for material damages, although it did partially allow the claim for moral damages, ordering that the defendant pay his victim 20 thousand UAH. The command of the military unit did not take any part in the court proceedings.

The Ukrainian Government's answers to questions put by the UN Committee against Torture regarding Ukraine's Fifth Periodic Report give the following figures. In 2005, when compared with the previous year, in all Ukraine's military formations, there were 1.6 times less cases of force used by military officials to their subordinates (83 cases involving 140 military servicemen against 123 cases involving 154 people in 2004). У 2006 military personnel committed 73 offences linked with violence against subordinates, a drop of 58% over 2004, and of 12 over 2005. Overall in 2006, 9 military servicemen died as the result of a crime, however most were not connected with didivshchyna According to Ministry of Defence figures, there were no cases of suicide linked with didivshchyna In 2004 one soldier committed suicide, in 2005 no cases were recorded, while in 2006 two soldiers killed themselves. We should mention that in order to avoid didivshchyna in the Armed Forces a new system for registering and reporting on offences has been introduced. According to the new approach, the commanders of military units who have uncovered offences linked with didivshchyna are not themselves held liable, while liability is increased for management at all levels for not informing of such offences in timely manner, or for concealing them. The Ministry of Defence states that during 2006 150 soldiers were convicted of didivshchyna-related offences or of using excessive force. Compared with 2002 the number of criminal proceedings fell by 20% (in 2002 this was 142, in 2006 – 119)) while the number over the use of force dropped by 23% (in 2002 – 85, in 2006 – 66).[3]

The Ministry of Internal Affairs which over a number of years had not acknowledged any problem over torture and ill-treatment or had tried to create the impression that any such incidents were isolated aberrations of individual police officers, in 2005-2006 acknowledged the systemic nature of the problem. A demonstration of the positive change in the Ministry's attitude to protecting human rights, and specifically to the issue of torture, was the creation at the end of 2005 of a Public Council for the Observance of Human Rights attached to the Ministry of Internal Affairs, with similar public councils attached to regional departments of the Ministry created in 2006. 10 working groups have been established, namely groups: on complaints alleging unlawful actions by law enforcement officers; on protection against torture and the right to liberty and personal security in MIA work; the MIA and human rights during elections; the MIA and freedom of peaceful assembly; the right to privacy in MIA work; the rights of the child and the MIA; the rights of refugees and migrants; preventing domestic violence and ill-treatment of children, human trafficking and gender issues in the MIA; human rights education; normative legal and method backup for the work of the Council.

[3] CAT/C/UKR/Q/5/Rev.1/Add/1. Written replies by the Government of Ukraine to the list of issues (CAT/C/UKR/Q/5/Rev.1) to be taken up in connection with the consideration of the fifth periodic report of Ukraine (CAT/C/81/Add.1), pp. 32,33,34,39,109.

Documents regulating the work of the Public Council are available on the Ukrainian Helsinki Human Rights Union website: www.helsinki.org.ua. There is also a section on the Public Council on the MIA's official website[4].

Another step in introducing public control over the work of the police came with the establishment of mobile groups. These include specially trained MIA officers and representatives of human rights organizations. The mobile groups carry out inspection visits to police stations in order to monitor the observance of human rights mainly in the MIA's temporary holding facilities [ITT]. The work of these mobile groups was first launched in 2004 in three regions – Kharkiv, Poltava and Sumy, while in 2005 it was extended to cover the entire territory of the country.

We should note that the MIA has over the last two years become the most open of all enforcement authorities. It is the most forthcoming in responding to information requests, for example to questions regarding unlawful activities committed by police officers. This information was previous given the stamp «For Official Use Only» and not available to the public, whereas now the MIA has made its internal statistics on such unlawful actions openly available.

According to MIA figures in 2006 5,126 complaints were received alleging unlawful actions by police officers. Of these, 435 were found to be warranted (8.5%). Included in this figure were 23 complaints of torture; 164 of beatings and inflicting of bodily injuries; 21 cases of unlawful detention on suspicion of having committed a crime; 48 cases of unlawful administrative detention and administrative liability. Criminal charges were laid against 14 officers of Internal Affairs agencies, and 225 officers faced disciplinary proceedings. This percentage of complaints found to be valid – 7 – 8% of the overall number is typical for the police in European Union countries.

Nonetheless the use of torture and ill-treatment in the police continues to be of a widespread and systemic nature. The number of reports of such cases has not abated. In order to achieve fundamental improvements a change in attitude to torture is needed, and this is a difficult task. Changes are needed also to both legislation and practice.

The State Department for the Execution of Sentences [the Department] remains entirely lacking in openness, which can be seen, for example, by comparing analogous figures from the MIA and the Department. According to their letter, during 2005 and the first six months of 2006, the Department received 489 complaints alleging unlawful actions by Department personnel. Not one of them (!) was found to be warranted. In response to an information request seeking figures for the number of complaints alleging unlawful actions by Department personnel, the number of complaints found to be warranted, the number of members of staff who faced disciplinary or criminal proceedings in 2006, a fob-off answer was received: «Bearing in mind that according to Article 19 of the Law «On information», government statistics are systematically and openly published and open access to them is assured, You are able, according to the legally established procedure, to find statistical information. The information you have expressed an interest in is given on the website of the State Department of Ukraine for the Execution of Sentences, which has the Internet address: www.kvs.gov.ua». Obviously, the figures requested are not contained on the Department's website.

The extraordinary difference in responses to information requests is one aspect of the different attitude of the management of these institutions to the issue of torture. Whereas the management of the MIA publicly acknowledges the existence of this problem and seeks ways and mechanisms for solving it, the words uttered by the Department's heads are aimed at extolling Department achievements and asserting the progressiveness of all its steps which are supposedly aimed at protecting human rights. The Department's actions, on the other hand, are aimed at retained the existing lack of openness and of any public control, and intimidation of prisoners in order to maintain order.

A KHPG expert study on how penal legislation and practice comply with international standards[5] reached the following conclusions: «the main concept (paradigm) of the Ukrainian system of punishment is the idea of developing a sense of guilt in the individual who is remanded in custody

[4] More information about the Public Council's first year of work is available in English at http://khpg.org/en/index.php?id=1174992345 (*translator*)

[5] Mykhailo Romanov: An analysis of how Ukrainian legislation regulating the rules and conditions for holding individuals remanded in custody in pre-trial detention centres (SIZO) comply with the standards and recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The full report can be found in English at: http://www.khpg.org/en/index.php?id=1156878627&w=Romanov

or convicted. All the conditions, procedure, mechanisms for implementing legal restrictions (in the case of remand in custody) or punitive elements (in the case of punishment) are aimed at differentiating between the person imprisoned and other members of society, at immersing the imprisoned individual in the negative consequences of the crime, not for the sake of self-correction, but in order that he or she «understands» what he/she has (allegedly) done. And this brings with it the sense that the individual is removed from society, separated from it and the sense that there is no possibility of «return». That is, the state shows no «forgiveness», and this is seen in all the structures directed at so-called resocialization (administrative surveillance, social and everyday provisions for such people, the existing problems with finding work, etc). These structures are not of a supportive nature, but rather of total control and lack of trust. ... A major problem which leads to the lack of conformity of norms of Ukrainian legislation to international laws is, in my opinion, the fact that in Ukraine there is a lack of culture and tradition for treating each person as an individual and as a human being, and for respecting him or her as such. in the consciousness of modern citizens and members of Ukrainian society there is no such thing as concepts like «dignity», «honour» and «humane attitude», or if there is, it is somehow lacking in clear substance. This situation leads to the attitude to people remanded in custody or to convicted prisoners being purely negatively. Such people are «bandits» and you have to be hard with them. This attitude was confirmed during the recent Orange Revolution when one of the slogans was «bandits should be put in prison!» Precisely this phrase encapsulates the attitude of society to individuals who are remanded in custody, and still more so to convicted prisoners. They should disappear from society, have no access to it, and just stay in prison. It is this attitude too which can be found in current penal legislation. The problem of bringing conditions of remand and convicted prisoners into line with international standards will not be resolved until the attitude of society changes to individuals who have ended up imprisoned. Only then will society formulate those provisions in legislation not only on paper, but also through real legal mechanisms and will understand those provisions and carry them out, not out of fear of being held liable, but from respect for the human being and individual»

Prosecutor's offices, as before, are to a large extent impeding progress on preventing torture by the slack way they carry out their duty to investigate allegations or other information suggesting the use of torture and ill-treatment. The effective lack of proper investigation into such cases is a systemic problem for the legal system in Ukraine. It engenders a feeling of impunity on the part of law enforcement officers who resort to torture, and contributes greatly to the fact that torture and ill-treatment are treated by many of them not as a crime, but as a routine element of their work in fighting crime.

Human rights organizations who united their efforts in the *Campaign against Torture and Ill-treatment in Ukraine (July 2003 – July 2006)* monitored investigations into allegations of torture. They attempted to have criminal investigations instituted in more than 60 cases. Although they do eventually succeed in getting investigations started, this requires enormous effort and leads to a late investigation.

We entirely endorse the view expressed by Amnesty International that «perpetrators of torture or ill-treatment enjoy effective impunity in Ukraine. When investigations are carried out they do not meet international standards of promptness, thoroughness, independence and impartiality, due largely to the dual role of the prosecution. Flawed investigations result in few prosecutions of law enforcement officers; and in the few cases where an official is convicted, often minimal sentences are imposed. The Prosecutor plays a central role, not only in the prosecution of cases, but also in the investigation of torture allegations, but by its very nature the institution is not independent or impartial.»[6]

We believe that the lack of independent, impartial and effective investigations and prosecution of law enforcement officers over allegations of torture and ill-treatment in part stems from the role of the Prosecutor in Ukraine. As the authority responsible for carrying out investigations and preliminary reviews of ordinary criminal cases, it is the Prosecutor who decides whether to institute criminal proceedings against police officers. The lack of an independent investigative body means

[6] Amnesty International. Briefing to the Human Rights Committee. June 2006

that cases against law enforcement officers are investigated inadequately, are dragged out, suspended or terminated altogether.

It is impossible to get substantive responses to information requests concerning the results of supervision by the Prosecutor over the work of law enforcement agencies. To all such requests for information, the Prosecutor General responded with formal fob-offs. No wonder that it was recipient of the anti-award «Thistle of the Year» awarded by the Ukrainian Helsinki Human Rights Union in 2006 as the least open government body in Ukraine. All of the information given below is taken from documents sent by the Government to the UN Committee against Torture.

In 2006 the Prosecutor considered 506 allegations of prohibited methods against remand or convicted prisoners. 6 were found to be warranted. According to the results of their review, 3 public officials have had criminal charges brought against them.[7]

It should be noted that the number of criminal investigations launched under Article 127 of the Criminal Code (torture and ill-treatment) rose in 2006. In 2005 criminal charges were brought against 9 people under paragraph one of Article 127 and 24 people under paragraph two. Over various instances of torture and other violent behaviour on the part of law enforcement personnel, the prosecutor's office in 2006 initiated 127 criminal investigations of which 62 have already submitted to the courts for examination in substance.[8] However according to a response to our information request directed to the State Judicial Administration, nobody was convicted of the crime set down in paragraphs three and four of Article 127.[9] So either the court proceedings have not yet concluded, or Article 365 which covers abuse of official position was used.

Nor does the Prosecutor take any steps to ensure the safety of people who submit complaints alleging torture. This is particularly applicable to those deprived of their liberty. The Prosecutor is, as a rule, passive and does not look after the safety of prisoners who have lodged complaints. There have, however, been cases of more treacherous behaviour.

In one case, after the beating of a large number of prisoners by special units, the Prosecutor General received a letter with complaints sent from the penal colony through illicit channels. The complaints gave a step by step account of events which had taken place on 31 March 2001, then later on 29 January 2002 in Penal Colony No. 58 in Izyaslav (Khmelnytsky region).

Such a consistent and logical account of events, combined with the way the information had been passed on, should have convinced the authorities not only of the likelihood that the events had indeed taken place, but that possibly officials of the local prosecutor's office were trying to prevent information being spread about the incidents.

The Prosecutor General should have at very least made efforts to ensure minimum guarantees of safety of the complainants, and specifically, confidentiality of the information received. According to Principle 33.3 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, «Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant». Yet the Prosecutor General sent the letter to the local prosecutor's office, and the latter in turn, in a letter dated 26 June 2001 suggested that the administration take disciplinary measures against Davydov for illegally sending complaints to the Prosecutor General.

Instead of investigating the reasons why a prisoner had been forced to use illicit means for sending complaints to the Prosecutor General, when the law envisages the possibility of submitting confidential complaints to the Prosecutor – the prosecutor's office proposed that Davydov should be punished for providing information which might demonstrate a crime and other violations of the law.

The consequences of the actions of both the Prosecutor General and the local prosecutor's office proved fatal for any investigation. For the purposes of the investigation, the Prosecutor General should have assumed that the events described in the complaint had taken place, and that even if the

[7] CAT/C/UKR/Q/5/Rev.1/Add/1. Written replies by the Government of Ukraine to the list of issues (CAT/C/UKR/Q/5/Rev.1) to be taken up in connection with the consideration of the fifth periodic report of Ukraine (CAT/C/81/Add.1), p. 23.
[8] Ibid, p. 198.
[9] Letter from the State Judicial Administration of Ukraine № 14-2930/07 from 16.05.2007.

local prosecutor's office was not implicated in them, it had nonetheless failed to use any measures of response, even though it was supposed to know about the events having its own representative on the spot.

The very lack of response from the local prosecutor's office to the events constituted a crime committed by a person in their official capacity.

Thus, if in the interests of the investigation, one assumes that the claimant was telling the truth, then in any case the local prosecutor's office and the penal colony administration had one interest in common – to conceal any proof of the event.

On 15 January 2007 the European Court of Human Rights found admissible the applications of 13 convicted prisoners, victims of the terrible beatings of 31 May 2001 and 29 January 2002 against Ukraine. The Court found that the claims of the applicants that Articles 3, 8, 13 and 34 of the European Convention had been violated were admissible.

Courts continue to use confessions obtained under torture even though both the Constitution and the Criminal Procedure Code prohibit using testimony received with infringements of criminal procedure legislation. This can be partly explained by the fact that, aside from a general provision regarding the inadmissibility of evidence obtained in breach of the law, there are no special rules or criteria for determining admissibility, in particular, whether the confession was made voluntarily. The rather weak development of the law on evidence is rooted in disregard for procedural issues. For a very long time, assessment of evidence was based upon the virtually unlimited personal conviction of a judge, which was, in turn, based on a «socialist sense of justice». As a result, in criminal procedure there are to this day no reasonably well-developed criteria for determining whether a confession was made voluntarily, nor is there any procedure for its exclusion from case evidence.

Courts hold to rather primitive tests to determine whether the confession was voluntary, usually failing to take into account the specific circumstances, under which defendants are forced, including through the use of torture, to make a confession. They work, for example, on the erroneous idea that the use of torture or other kinds of coercion used to force a confession must be established by a court decision in order to declare a given confession inadmissible. Court practice shows that a well-grounded doubt as to whether a confession was made voluntarily is not sufficient to have it excluded from the evidence.

In cases, when a court considers that there are serious grounds for believing that «unlawful investigative methods» were applied to the defendant, the court instructs a prosecutor's office to examine the relevant claims made by the defendant. As a rule, this examination is carried out by the same unit of the prosecutor's office, which supported the case in court. In most cases, such examination results in a refusal to initiate a criminal investigation. Once courts receive the decision made by the prosecutor's office refusing to initiate a criminal investigation or, when applicable, a decision to suspend a criminal investigation, they do not, in general, investigate the defendant's claims of torture any further, and explain the claims away as being an attempt to avoid answering for their actions.

Such an approach by the courts to investigating and assessing defendants' allegations of torture takes into account neither Ukraine's international obligations, nor the existing system in Ukraine for examining claims that torture has been applied. Under international obligations, in particular, according to Article 15 of the Convention, rules as to whether confessions are to be excluded from admissible evidence should be governed by the shifting of the burden of proof that a confession was given freely on to the prosecution. The mere fact that, according to international standards, any claim that torture was used must be officially investigated suggests that a person who has been subjected to torture, will not be able to prove their claim on their own, still less to prove them «beyond reasonable doubt». Yet the standards for evidence actually used by courts, do not take this fact into account.

This means that at present the onus of proving «beyond reasonable doubt» that a confession was made under duress is on the defendant. Such a shifting of the burden of proof that a confession was not voluntarily given results in the fact that a great number of confessions made under duress

are not excluded from admissible evidence, and this, in turn, encourages further use of torture and other means of applying unlawful duress on defendants.

The problem with regard to determining the admissibility of a confession is further exacerbated by the fact that this approach makes no distinction between proving that torture did actually take place, and proving the personal guilt of those responsible. Thus, the defendant, who tries to prove that his or her confession was obtained by using torture, can do this only after criminal prosecution of the specific perpetrators has been completed.

In one monitoring study, 594 out of 732 prisoners asserted that they had been subjected to violence on the part of law enforcement officers. Two hundred and fifty four said that they had told the court that coercion had been applied. According to the respondents, however, only in 20 cases had the court paid attention to these allegations.[10]

The results of the study demonstrate the attitude of the courts to allegations of torture in general. However since it is difficult from the report to understand what the respondents meant when they said that «the court paid attention to their allegations», one cannot judge whether the confessions obtained through the use of coercion were excluded from the evidence.

On the other hand, courts uphold 46-47% of the complaints lodged against the actions of the investigation units (in 2003 5,991 such complaints were examined by the courts with 2,805 being allowed; in 2004 – 7,494 (3,495 upheld); and in 2005 – 10,020 (4,616 upheld). Courts in 2003 issued 2,473 separate judgments regarding violations of the law in carrying out detective inquiry or pre-trial criminal investigations, with 3,495 such judgments issued in 2004, and 1,512 in the first six months of 2005. In 2006 the courts examined 11,629 complaints against the behaviour of investigation units, with 5,564 being allowed. However it is not possible to establish how many judgments were issued as a result of review of cases of torture or ill-treatment.

2. CLASSIFYING TORTURE AS A CRIME

In the light of Article 4 § 1 of the European Convention on Human Rights Article 127 can be considered only in the version of the Law from 2005 which came into force on 16 February 2005.

The components of the crime, set out in part 1 of this section were changed in the following way:

«Torture, that is, the intentional inflicting of severe physical pain or physical or psychological suffering by means of beatings, torment or other coercive actions in order to force a victim or other person to do something against their will, such as to obtain from him/her or another person information, testimony or a confession, to punish him/her for actions, which he/she has committed or is suspected of having committed, or to intimidate him/her or other persons...»

The Article was also supplemented by paragraph 3, which defines a «law enforcement officer» as a special party, and paragraph 4 which categorizes causing death as a result of the use of torture as an aggravated circumstance. Paragraph 3 provides punishment from 10 to 15 years of imprisonment, paragraph 4 – from 12 to 15 years imprisonment or a life sentence.

Although this part of the law from 12 January 2005 was clearly intended to implement requirements of Article 4 of the Convention into Ukrainian legislation, this task was not fully accomplished.

This is firstly because the provisions of Article 127 §§ 3 and 4 cover only a «law enforcement officer». This formulation clearly excludes other government agents. Thus, other government agents, for example, military personnel, can have criminal charges laid only under Article 127 §§ 1 or 2 of the Criminal Code, which provide for punishment that is not in line with Article 4 § 2 of the Convention.

Secondly, in the proposed version, the mark of «torture» remains a «violent act». This narrows the scope of that section compared to the definition of Article 1, which defines as torture «any act by which severe pain or suffering... is intentionally inflicted». Even though the narrowing of the defini-

[10] «Observance of the rights of remand and convicted prisoners In Ukraine», a study carried out by the Ukrainian-American Bureau on Human Rights in 2006.

tion of torture by the introduction of the element of «violent actions» may seem unimportant from the point of view of inflicting pain, it is very important with regard to suffering, which can be caused not only by violent action, but also by the creation of certain circumstances. These circumstances in some cases could be created by actions, which, in themselves, are not violent. For example, the formulation of section 127 § 3 of the Criminal Code fails to cover purposeful inaction, when an official was aware or should have been aware that such inaction would have caused pain or suffering.

Thirdly the definition in Article 1 of the UN Convention against Torture is aimed only at representatives of the State. However, the Law contains a definition of torture in Article 127 §§ 1 which covers a general perpetrator. This creates a certain lack of logic which can be seen in the example of an indicator such as «obtaining a confession». Only a representative of the State needs a «confession» in the technical meaning, in which it is used by the Convention. If we applied the purpose of «obtaining a confession» to a general subject, this would widen the meaning of «confession» far beyond the boundaries of its usual meaning. The same to some extent holds true for the purpose «to punish for actions».

Fourthly, among elements of the crime «torture», there are no relevant actions related to «a person's racial, national, religious, social, language, gender, age or other belonging», as well as related to his/her activity or position concerning a certain issue. Clearly, such a motive for the crime is not encompassed by the purposes «to obtain information» or «to punish», provided in Article 127 § 1. Therefore, persons, who resorted to actions stipulated in Article 1 of the Convention motivated by discrimination of any kind, cannot be brought to justice under Article 127 §§ 3 or 4 of the Criminal Code.

Finally, it remains also unclear, which specific provision of section 127 will be applied for persons, who are not government agents, but who act «with the knowledge or tacit consent» of government agents. According to Article 29 of the Criminal Code

1. The perpetrator (co-perpetrator) shall be criminal liable under the article of the Special Chapter of this Code that covers the offence which he or she committed.

2. The organizer, instigator and accomplice shall be criminally liable under the corresponding part of Article 27 and the Article (paragraph of the Article) of the Special Chapter of this Code that covers the offence committed by the perpetrator.

However, since the text of Article 127 §§ 3 and 4 excludes their application to persons other than «law enforcement officers», it is possible that the officers of a law enforcement agency, who were accomplices in the «torture» committed by a person, who is not a «law enforcement officer», will be brought to justice under Article 127 § 2, not under 127 § 3 of the Criminal Code. Also, this provision makes it impossible to convict, under Article 127 §§ 3 or 4 a person, who is not a «law enforcement officer» but participated with the latter in the use of torture because were there to be a conviction the principle of nullum crimen sine lege [*no crime, no punishment*] would be violated.

Yet despite these shortcomings, the amendments to Article 127 of the Criminal Code constitute a significant step forward in implementing the provisions of the UN Convention against Torture. The fact that torture applied by law enforcement officers is placed in a separate part of Article 127 leads one to hope that in the future we will be able to obtain statistical data as to the implementation of this provision.

The practice of using criminal punishment against law enforcement officers, as before, was based on provisions, which established criminal liability for exceeding power and the authority vested in them (Article 365 of the CC). However, this Article contains a classification of crime, which could cover a wide range of offences. The dilution of the term «torture» into a wider term «exceeding power» makes it possible to conceal the actual prevalence of torture and impedes effective control over implementation of the obligations under Article 4 of the UN Convention against Torture concerning severity of punishment and use of amnesty. It also interferes with the effective use of provisions under the criminal law with respect to accomplices of individuals, who use torture.

A number of actions, which are qualified by the UN Convention against Torture as torture or ill-treatment can fall under Article 373 of the Criminal Code «compulsion to testify». Paragraph 2 mentions «use of coercion or humiliation of the person» as elements of this and provides for 3 to 8 years imprisonment.

It remains rare for government law enforcement officers to be convicted of using torture. Nor do the sentences meted out by the court in the case of conviction correspond to the gravity of the crime. Convicted officers often receive conditional sentences, although, there have been some quite severe sentences imposed.

For example, two former police officers in the Kherson Region were sentenced to 7 years, and a third to 5.5 years imprisonment, together with confiscation of their personal property and a ban on holding any position in law enforcement agencies. They had been convicted of torturing a suspect in order to obtain his confession. As the author of the report points out, «during the entire period of Ukraine's independence, this is the first case in the Kherson Region, when police officers have been sentenced to realistic terms of imprisonment specifically for the use of torture»[11]

In another case, the Chernihiv Regional Court sentenced Police Captain Valery Stashko to 14 years imprisonment. His accomplice, Senior Sergeant Mykola Reshotko, was sentenced to 5 years imprisonment with a 3-year probation period. The Supreme Court upheld the sentence. In his address to the court, Prosecutor Anatoly Lavrinenko said, «Stashko inflicted open cerebral injury on Ivashov, fracture of the sublingual bone, closed neck injury, which resulted in the death of the victim»[12]

On 3 July 2006, the Kyivsky District Court in Kharkiv convicted police officer A.V. Khodarkovsky of having committed a crime stipulated in Article 101 of the Criminal Code (version of 1960) «Deliberate grievous bodily injury» and Article 365 § 3 of the Criminal Code (version of 2001) «Exceeding power or authority causing grave consequences». On 14 April 1998, Khodorkovskiy inflicted on Serhiy Aleksakhin a number of bodily injuries, including concussion, fracture of the discs between the 2nd and 1st thoracic vertebra, simple fracture of axis arch. The court handed down a 5-year term of imprisonment (this is lower than the minimum term prescribed by law for the combination of these crimes) and released him on parole.

At the beginning of 2007 the trial began in Kharkiv of three former police officers who are alleged to have tortured Oleh Dunich during the night from 7 to 8 December 2005. Oleh Dunich died in hospital on 9 December from injuries incompatible with life.[13] The defendants have been remanded in custody in a SIZO [pre-trial detention centre], and the court proceedings are continuing.

There is no classification of «cruel, inhuman and degrading treatment and punishment in Ukrainian criminal legislation. The courts can only rely on judgments handed down by the European Court of Human Rights with respect to Article 3 however we are unaware of any cases where this has been done.

We would note that in July 2006 the Verkhovna Rada ratified the Optional Protocol to the UN Convention against Torture [OPCAT] which, among other things, envisages the creation of a national preventive mechanism [NPM] for the prevention of torture and ill-treatment. Yet since then the government has taken no steps towards creating this NPM. The Human Rights Ombudsperson, who the Verkhovna Rada had suggested should see to implementing the NPM at first said that her Secretariat was in fact the national preventive mechanism. Later it was stated that this was a matter for the Ministry of Justice, and later still, that a special executive body needed to be created which could carry out the functions of the NPM. It is clear, however, that the requirement of independence in this case is not being observed. The need for a functioning national preventive mechanism is extremely relevant as the examples below graphically indicate.

3. CASES OF TORTURE AND ILL-TREATMENT

VALERY NOVIK

Valery Novik was a businessman, living in Minsk. In August 2004 he left Belarus for Kyiv due to serious pressure he had begun experiencing from the authorities over his involvement in the op-

[11] The newspaper «Novy Den' [«New Day»] (Kherson), 22 April 2004 .
[12] The newspaper «Vechirni visti» [«Evening news»] from 22 June 2004
[13] More detail can be found in Human Rights in Ukraine – 2005», Kharkiv: Prava Ludyny, 2006, and as the trial continues on the English page (under Against torture and ill-treatment) at www.khpg.org

position movement. In December his family joined him in Kyiv. On 30 November 2006 at around 19.00 N. was stopped by police officers in Kyiv. They said that there were some problems with a car and asked him to go with them to the Pechersky District Police Station. Then when already in the police station he was informed that he had been detained at the request of the law enforcement agencies of Belarus and the Ukrainian Ministry of Internal Affairs in connection with the fact that in Belarus he was accused of having «run business activities without registration as a legal entity». He was shown the ruling on declaring him a suspect. No other documents were presented. On the same day he was placed in a temporary holding facility (ITT).

On 1 December 2006 Valery Novik was remanded in custody for 40 days pending an application for his extradition. From the ruling of the Pechersky District Court, it would seem that the criminal investigation bodies in Belarus took the decision on 27 October 2005 to remand Novik in custody. Two days earlier, on 25 October, he was placed on the police wanted list.

On 4 December 2006 Novik's lawyer appealed the ruling in the Kyiv Court of Appeal, however on 8 December the latter upheld the original ruling by the Pechersky District Court. On 4 December lawyers from the Fund for Legal Aid to Victims of Torture lodged an application with the European Court of Human Rights to apply temporary measures and on 8 December the European Court acceded to this application and sent the relevant letter to the Government of Ukraine. On 11 December a claim was submitted to the European Court in which Novik asserts that Ukraine will be violating Articles 3 and 6 of the European Convention on Human Rights [the prohibition against torture, and the right to a fair trial] if it hands him over to Belarus. He claims that the criminal case is politically motivated and refers to the widespread practice of extracting «confessions» from suspects through the use of torture and other forms of inhuman treatment. He also asserts that due to the legal system and practice in Belarus he cannot hope for a fair court hearing. Novik has, in addition, stated that Article 5 [the right to liberty and security] of the Convention was violated during the detention.

On 25 December 2006 Ukraine's Prosecutor General turned down the request from the Prosecutor General in Belarus for Novik's extradition due to the fact that the crime he is charged with is not one subject to extradition according to the 1993 Minsk Convention. On 25 December 2006 he was released from custody.

The European Court has referred the Novik Case for communication with the Government of Ukraine with respect to Article 5 of the European Convention.

SVIATOSLAV BABENKO

28-year-old Sviatoslav Babenko who works as the head of security for one of the big sports complexes in Kharkiv was summoned on 12 December 2006 to the police in order to «have a chat about former acquaintances and old contacts». It transpired that this was over the robbery of the firm «Zigzag of success» where one hundred thousand US dollars had been stolen from the safe. Mr Babenko acknowledged that he knew the suspect but stated that he had nothing to do with the crime. He was then asked to come back another time and be subjected to a lie detector test. Babenko agreed. The next morning he was taken to some «dubious private flat» in the city centre where he was connected to the lie detector and asked some questions. Saying nothing about the results, they took him back to the police station. There, according to Babenko, he was told the following: «You have two options: either you confess that you stole the money and give it back, or you won't leave here alive. We'll plant drugs on you and you'll go to SIZO [a pre-trial detention centre] right now. There they'll hold you until you give up your flat and your car», Babenko repeated that he was innocent and asked them to sort out the case. He was then taken to «a confrontation» with the suspect.

Sviatoslav recounts: «They put handcuffs on me in the car, a woolly hat over my eyes and on top two plastic bags. They took me to some building where there were brick walls without plaster, and with a concrete floor, with a table in the middle and two chairs. They sat me on the concrete floor; handcuffed me behind my back, and pulled tightly. There were five police officers, two of them with masks on. One sat on my legs and the other put a gasmask on me and started blowing cigarette smoke down it. I couldn't breathe and lost consciousness. They beat me in the chest and

in the stomach so that I'd swallow as much smoke as possible. Sometimes they took the gasmask off and continued to threaten that if I didn't write a confession saying I'd stolen the money, I wouldn't leave the place alive, and that they'd bring my wife there and rape her in front of me. I began to have a terrible pain in my heart, I thought any second now and I'd have a heart attack. Then, not able to bear any more vicious torture from the «law enforcement agencies», if you can call them that, I maligned myself, said that I'd stolen the money and given it to my wife.»

Babenko says that the torture lasted for around seven hours. It was only after he gave them a written confession, and at the police officers' demand, signed a note saying that he didn't have any complaints against them, that they released him. They didn't institute criminal proceedings.

Doctors examining Babenko found numerous haemorrhages around the neck, injuries to the neck cartilage and to his forearm bones. As the result of treatment for his lungs and throat he had difficulty talking for several months.

The next day, Babenko wrote a statement to the regional department of internal security of the MIA and to the Prosecutor of the Leninsky District in Kharkiv. However no decision to launch a criminal investigation was taken for a month after the events, although under Article 97 of the Criminal Procedure Code it should have been taken within 24 hours of receiving Babenko's statement.

The police claim that Babenko's statement is only an attempt to avoid liability and that they have all grounds for believing him to be implicated in the robbery of the firm «Zigzag of success».

YURY MOSYEENKOV

On 7 May 22-year-old Kyiv resident Yury Mosyeenkov was detained on suspicion of having killed Mr L. and taken to the Dniprovsky Prosecutor's Office in Kyiv. A week earlier, Yury had been in a snack bar one evening, a man he didn't know had come up to him, and they had chatted a bit. The man was found murdered the next morning, with four knife wounds. The waitress in the snack bar had stated that Yury was the last person to have spoken with the dead man.

Shortly before this Yury had undergone a serious operation involving trepanation of the skull which he immediately informed the investigators of. However three officers under the direct leadership of the Prosecutor's Investigator Dmytro Tytor began systematically beating him specifically on the head with rubber batons. When he lost consciousness, they flung him into the prosecutor's office basement, and then resumed their «interrogation». By the third day, Yury had lost any sense of reality and he signed not only the «voluntary confession» which they dictated to him, where he declared himself entirely guilty of the killing, but also a whole pile of blank sheets.

The investigation lasted almost two years. All of that time Yury Mosyeenkov was not allowed a lawyer, at first supposedly at his own request. When however a lawyer was appointed, it turned out that for more than 10 months Yury had been held in SIZO without any court order. From October 2005 «no applications from the pre-trial investigation unit were made to the court regarding an extension of the accused Yury Mosyeenkov's remand in custody». The Prosecutor General has initiated a criminal investigation into the case, yet is at the same time continuing to insist on the charges of murder. On 1 February 2007 Yury was released on a signed undertaking not to abscond. The court proceedings over the charges of murder are continuing while the case over his being held unlawfully in prison is not being investigated.

SERHIY BAZIK AND OLEKSY POVIDAICHYK

23-year-old Serhiy Bazik and Oleksy Povidaichyk were serving sentences in the Vinnytsa Penal Institution No. 1. At the beginning of April 2007 the mothers of the two men both sent complaints to National Deputy Kateryna Levchenko alleging that their sons had been brutally beaten by penal staff. Bazik's mother also wrote that at a meeting she had with the Head of the Institution Volodymyr Matsypura, the latter confirmed that Bazik had been beaten for sleeping in and being late for work. Matsypura allegedly said that they had been beaten and would be beaten again, that this was their method of re-educating prisoners and that he wouldn't advise making a complaint or her son would have it worse.

Kateryna Levchenko went to Vinnytsa to establish the circumstances. She met with the Head Matsypura who did not deny the use of physical forms of exerting influence. She then met with Bazik, Povidaichyk and other prisoners of Vinnytsa Penal Institution No. 1 in the presence of the Deputy Head of the State Department for the Execution of Sentences [the Department] M.P. Iltyai, the heads of the penal institution and of the Vinnytsa Regional Division of the Department, as well as representatives of the community. The prisoners confirmed their testimony that they had been beaten and one of them showed red bruises half a metre long from his waist to his knees. A decision was taken to carry out an official check.

However three weeks later Major-General Iltyai was already asserting that he had not witnessed the evidence of the beatings. During the investigation, those prisoners at No. 1 who had previously made verbal allegations of beatings, wrote statements saying that they had no complaints against the management, and that they had no information about physical measures of influence both against themselves, or against other prisoners. They also wrote that they don't like it when people write letters to Deputies and others in the outside world.

On the results of the official investigation, disciplinary measures were brought against the Head of Vinnytsa Penal Institution No. 1 Matsypura, however not for the beatings, but for «failing to inform the management in timely fashion about the situation in the institution». At the same time, the Vinnytsa Regional Prosecutor refused to launch a criminal investigation against the officials of the institution, claiming that there were no elements of a crime. The beating and exceeding duty in applying special means were denied.

Both convicted prisoners were moved to serve their sentences out further away from the capital, Bazik to Donetsk, and Povidaichyk to the Lviv region. The moves were explained by concern for their security and to protect them from possible offences against them committed by other prisoners wanting to get revenge because of the complaints they wrote. The Head of the Department Vasyl Koshchynets, during a meeting with the Chair of the Verkhovna Rada Committee on legislative provisions for law enforcement activities Volodymyr Sretovych, placed the responsibility for the situation on the mothers and Deputies who «through their interference and complaints have worsened the situation with prisoners». Mr Koshchynets said that he would not take responsibility for their safety if their mothers continued to complain.

PRISONERS OF THE IZYASLAV COLONY NO. 31[14]

On 14 January 2007 all prisoners at the Izyaslav Penal Colony No 31 (more than 1,200 men, first time offenders, and in the main young men from 18 to 22) declared a hunger strike. They were protesting against beatings and degrading treatment by staff, arbitrary punishments (each prisoner who wrote a statement gave glaring examples), infringements of working conditions (only a small percentage of those working, not more than 10%, had wages paid, the others received nothing), bad conditions and medical care (one telephone for everybody, and you had to earn the right to a call; food and medicines beyond their sell by date – there were even some cans of food from 1979), as well as the complete lack of any chance of sending complaints against administration behaviour. One of the prisoners' demands was the removal of the head of the colony.

On the same day a commission from the State Department for the Execution of Sentences arrived at the colony. It was led by the Deputy Head of the Department Major-General Iltyai who listened to the prisoners' grievances and promised to rectify the situation. That evening already the prisoners went to supper.

The Department explains the events at No. 31 differently. They say that the young head of the institution Andriy Bozkho was unable to cope with the problems of the colony, and «the informal management of the colony» got out of hand and wanted to determine themselves who would manage the institution and what the rules of behaviour would be. They therefore organized the protest action. Supposedly it was no hunger strike since none of the prisoners wrote a personal statement refusing to eat. The prisoners had received very good parcels from home coming up to New Year,

[14] More about this can be found in English on the KHPG website:. www.khpg.org

and could afford to put such pressure on the administration. Such behaviour was a threat to order in the colony and the organizers of the action needed to be punished.

The punishment was not long in coming.

On 22 January 2007 a special anti-terrorist unit was brought into the colony, with men in masks and military gear. They brutally beat more than 40 prisoners and took them away, half-dressed, some of them without even house shoes (all their things were left in the colony), beaten and covered in blood, with broken noses, ribs and bones, and with teeth knocked out, to the Rivne and Khmelnytsky SIZO where they were again brutally beaten. In the SIZO they used torture to extract signed statements that they didn't have any grievances against the administration of Penal Colony No. 31, against the SIZO, the convoy, and also a statement backdated to 21 January asking to be moved to another colony to serve out their sentence. The prisoners say that they were urinating blood for some time, and for more than a month, they couldn't move their wrists properly because of the handcuffs used on them.

Try as the Department did to hush the story up, publicly asserting that there'd been no hunger strike, no special forces nor beatings, the mass media reported both the events of 14 and 22 January and later. The parents of the prisoners approached human rights organizations, journalists from TV Channels 5 and «1 + 1», and other media outlets. The human rights organizations and parents wrote statements to various bodies demanding that a criminal investigation be instigated in connection with the unlawful actions of the Department.

The State Department for the Execution of Sentences has still not admitted that the prisoners were beaten and that their belongings disappeared. The Secretariat of the parliamentary Human Rights Ombudsperson sent the complaints received from parents and the prisoners themselves to the prosecutor's office and to the selfsame Department (!), although personnel from the Secretariat had themselves been in Colony No. 31. All prosecutor's offices at different levels have refused to launch a criminal investigation and have maintained that the behaviour of Department staff was lawful. With regard to the loss of belongings, the prosecutor's office in the Khmelnytsky region claimed that the belongings had been moved together with the prisoners, that the money in their personal accounts had been handed over and used for the needs of Izyaslav Penal Colony No. 31 on the written authorization of the prisoners themselves. The Prosecutor General, in contrast, has acknowledged that on 22 January methods of physical influence were applied to prisoners – but says this was as the result of resistance from the prisoners to a search. It also maintains that since not one of the prisoners has made a complaint alleging unlawful behaviour, there are no grounds for launching a criminal investigation.

The events of 22 January were subjected to scrutiny by the UN Committee against Torture which reviewed Ukraine's Fifth Periodic Report at its 38th session on 8 and 9 May. When asked by one of the Committee's experts what had happened at Izyaslav, the Government Delegation responded that a special purpose unit had been brought in to quell a riot. Nonetheless, in their «Conclusions and Recommendations» on 18 May, the Committee directly stated that: «The State party should also ensure that the anti-terrorist unit is not used inside prisons and hence to prevent mistreat and intimidation of inmates»

The Head of the Department Vasyl Koshchynets often repeats that the Department is a law enforcement body which is in the frontline of the fight against crime. Yet throughout the world the penal system is a civilian service. In Ukraine this system requires radical reform. Conditions must really be created which ensure respect for prisoners' dignity, minimize the adverse effects of imprisonment, eliminate the enormous divide between life in penal institutions and at liberty, and support and consolidate those ties with relatives and with the outside world which best serve the interests of the prisoners and their families.

In our view, a shocking crime was committed. It remains however unpunished since there is effectively no system of investigating allegations of torture. After all the prosecutor's office on the one hand only agrees to launch a criminal investigation where there are statements from victims of torture, while on the other, fails to take any effort to ensure those people's safety. They are thus under the total control of their torturers which simply leaves no chance for complaints. Other mechanisms are therefore needed to prevent torture and to investigate these crimes.

4. THE WORK OF CIVIC ORGANIZATIONS IN COMBATING TORTURE AND ILL-TREATMENT

The Kharkiv Human Rights Protection Group began systematic work aimed at reducing the level of torture and ill-treatment in Ukraine in 1996. The results of this ongoing work have demonstrated that change for the better can be achieved only through a comprehensive, multidirectional approach. This involves:

- Gathering and publishing reports alleging the use of torture and ill-treatment;
- Analyzing criminal and criminal –procedure legislation to check for compliance with international standards and then changing what is needed;
- Studying the use of torture as a social and psychological phenomenon;
- Ensuring investigations are carried out into allegations of torture and that the perpetrators are punished, maintaining close working ties to this end with bar lawyers;
- Changing the attitude of the law enforcement agencies and society in general to the use of torture;
- Carrying out a widespread awareness-raising campaign aimed primarily at «groups at risk» – the police, the prosecutor's office and the courts; familiarizing them with international mechanisms for preventing torture, in particular, case law of the European Court of Human Rights with respect to Articles 3 and 5 of the European Convention on Human Rights and the Committee against Torture's Standards and Recommendations;
- Working in cooperation with the law enforcement agencies on eradicating torture and ill-treatment;
- Building a strong network of human rights organizations encompassing the entire country to ensure that no case of torture goes unnoticed;
- Establishing strong working relations with the Human Rights Ombudsperson, the Ministry of Justice, parliamentary committees on human rights, legal policy and legislative provisions for law enforcement work without which it is difficult to promote change in legislation and in practice;

In 2002 KHPG prepared a major project for a campaign against torture embracing all of the above-mentioned directions and approached sponsors seeking support. The project «Campaign against Torture and Ill-treatment in Ukraine» gained the support of the European Commission, the National Endowment for Democracy (USA), the International Renaissance Foundation, the Open Society Institute (Budapest) and others.

The aims and objectives of the project were to do the following:

1. Gather information and undertake public investigations into cases of torture and ill-treatment, passing this information to concerned parties, the media, and organizations, in particular, via the Internet;
2. Create a mechanism for providing legal, specialist and medical assistance to victims of torture, with this including legal defence in court;
3. Develop a network of organizations and private individuals involved in the issue of torture and ill-treatment;
4. Organize joint actions of members of the network aimed at combating torture and providing protection against it;
5. Organize public campaigns, including via the electronic media, in order to raise awareness and change the public's attitude to the issue of torture and ill-treatment;
6. Analyze administrative, criminal and criminal – procedure legislation, as well as its practical application, in areas where torture and ill-treatment are likely;
7. Compare domestic legislation with:

a) The UN Convention against Torture and Articles 7, 9 and 10 of the International Covenant on Civil and Political Rights;

b) Judgments of the European Court of Human Rights with respect to Articles 3, 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [the European Convention];

c) Committee against Torture [CAT] standards on prisoners' conditions

d) CAT recommendations to the Government of Ukraine regarding changes to legislation and practice;

8 Prepare digests containing judgments of the European Court of Human Rights with respect to Articles 2, 3 and 5 of the [the European Convention in the context of prevention of torture and ill-treatment;

9. Analyze improvements to legislation and practice relating to minors in areas where torture and ill-treatment are likely.

10. Improve legislation and practice with respect to detention, arrest and detention in the custody of the police, as well as the development of legislation concerning investigations into torture;

11. Prepare, publish and circulate the results of monitoring and studies in seven books, each with a print run of 1,000 copies;

12. Carry out systematic work with target groups (staff of the police and prosecutor's office, judges, defence lawyers, specialists – legal, forensic medicine, doctors, journalists, activists from civic organizations, the public in general) in order to raise the level of knowledge and skills regarding international and European human rights standards;

a) undertake sociological research in order to ascertain the attitude among target groups towards the use of torture and their knowledge of legislation on prevention of torture;

b) hold seminars and training courses for various target groups;

c) prepare, publish and circulate material for a course «Human rights and the Police» in higher educational institutes within the MIA system;

Over five years (2002 – 2005) these objectives were to a certain extent achieved and the foundation laid for further work.

By the end of 2006 a specialized network of human rights organizations covered 22 regions of the countries and included the following groups: KHPG, the Sevastopol Human Rights Group; the Vinnytsa Human Rights Group; the International Society for Human Rights – Ukrainian Section (Kyiv) and its branches in Zhytomyr and Dnipropetrovsk; the Luhansk Public Committee for the Protection of Constitutional Rights and Civil Liberties; the Chernihiv Civic Committee for the Protection of Human Rights; the Kherson Regional Fund for Charity and Health; the Lviv Centre for Legal and Political Research «SIM»; the All-Ukrainian Association «Zeleny svit» [«Green World»] and its branches in Kyiv, Kryvy Rih, Severodonetsk, Chortkiv, Artemivsk; the Luhansk and Kherson Branches of the Committee of Voters of Ukraine; the «Helsinki-90» Committee; regional branches of the Union of Soldiers' Mothers of Ukraine; the Civic Office «Pravozakhyst» [«Human rights protection»] (Sumy); the Zaporizhya «Youth Movement»; the Kirovohrad «Civic Imitative» and others.

Overall KHPG has worked with 35 organizations within the framework of this project. Of these 9 are special partners who carried out autonomous mini-projects, and 29 are regional partners and members of the information network which are involved with gathering information about cases of torture and ill-treatment, giving help to victims, taking part in joint actions and other work as part of the network. Regional partners have, for example, created 15 public reception centres to provide assistance to victims of torture and ill-treatment.

Among joint actions by members of the network we can mention the protests against the adoption of a new Criminal Procedure Code in the version being proposed; an action aimed at ensuring the right to freedom from torture in Ukraine; on protection of human right during the Presidential elections in 2004; as well as several actions in support of specific victims of torture or ill-treatment.

KHPG held three working meetings with regional partners in September 2003, January 2005 and June 2006. All the regional partners reported on their implementation of the project, on regional departments of law enforcement agencies and the courts, as well as holding press conferences. The regional partners regularly collect and publicize available information about cases of torture, commission lawyers to prepare complaints to the prosecutor's office and address information requests to the law enforcement agencies seeking official information about unlawful behaviour from law enforcement personnel regional partners A special electronic mailing system UWGAT@yahoogroups.com was set up to enable communication between the partners. It is like an electronic conference where members of the network can learn about the work of other participants, offer their comments and ideas linked with carrying out the project and also consult with more experienced colleagues. This method of communication proved highly efficient, particularly

for passing on information about cases of torture and other violations, as well as for giving help to victims, for sharing experience in resolving this or that problem and seeking contacts needed. The expansion of the network of participants and the coordinated actions of a professional network has led to a certain reduction in the latency of torture and considerably more cases of unlawful coercion by law enforcement officers have been brought into the public eye. Whereas the 2001 publication giving an overview of cases of torture and ill-treatment from 1 June 1997 to 31 May 2001 filled 272 pages, the analogous publication, but for one year from 1 June 2001 to 30 May 2002 came to 224 pages, and the overview of reports for 2003 alone already came to 366 pages. Another result of the network's activities was a substantial broadening of the geography of criminal cases over torture and ill-treatment.

At the beginning of 2004 the campaign members decided to not make information alleging torture or ill-treatment public immediately, but to concentrate on the legal defence of the victims, and to create a mechanism for preventing of ill-treatment. On 7 July 2003, KHPG founded the Fund for the Professional Assistance of Victims of Torture and Ill-treatment. The Fund has supported most of the cases where victims of torture have tried to get public officials punished for unlawful coercion. It provides the following types of assistance:

1. legal assistance in cases of detention or arrest by Internal Affairs agencies, including in any cases involving the arrest of a minor;
2. legal assistance where detention by the police lasts longer than the legally permitted period;
3. legal assistance in preparing and representing cases during consideration of arrest / release;
4. legal representation of victims of torture in the prosecutor's office and the court during a criminal investigation against suspected perpetrators of torture and during civil compensation claims, including to the European Court of Human Rights;
5. Urgent medical examination by an independent doctor of a detainee who alleges being subjected to torture;
6. Compensation for costs on examining potential victims of torture by competent medical, psychological and other specialists to ascertain whether torture was used;

Over three years (2004 – 2006) participants in the campaign collected 1,536 reports of torture and ill-treatment. Of these, 738 were from KHPG (398 – appeals received or visits to the public reception centre and 340 reports from the mass media); 798 from regional partners.

In three and a half years the Fund supported more than 140 cases in different regions of the country. One may hope that the cases backed by the Fund will have a significant impact on court and administrative practice. As mentioned on many occasions, one of the most difficult problems in this area is the lack of response to complaints alleging torture. At the same time the European Court of Human Rights classifies the lack of swift and efficient investigation into such allegations as a violation of Article 3 of the European Convention. The Fund's lawyers have therefore submitted more than 60 applications to the European Court on behalf of victims of torture. In one of these cases, that of Afanasyev v. Ukraine, the Court on 8 April 2005 found that there had been violations of Article 3 and Article 13 (lack of effective remedies) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This crucial judgment should force the government to carry out investigations into allegations of torture. The Court is presently communicating with the Ukrainian Government over 14 applications. The rest await a decision as to whether they are admissible. Thus far not one application has been found inadmissible.

KHPG and its special partners carried out one sociological and eight monitoring studies. The sociological study was on «Ill-treatment and torture in Ukraine / the law enforcement system» (the Kharkiv Institute of Social Research), while several monitoring studies were on the human rights situation in the Armed Forces (the Kharkiv Regional Union of Soldiers' Mothers). During the campaign a number of parts of domestic legislation and legal practice were analyzed in terms of their compliance with international standards. The following received close analysis:

♦ Legislation and practice in investigating allegations of torture; periods taken for the investigation; the thoroughness of the investigation; the degree of independence of the investigative body; the rights of the victim during the investigation;

♦ Arrest without a court order, preliminary conditions for receiving authority to make an arrest; arrest procedure and conditions of lawfulness;

♦ Being held in police custody and safeguarding of the rights of the detainee; the right to be informed of ones rights; the right of access to a lawyer; the right to remain silence; the right to be informed of the grounds for the detention, and the right to have relatives etc notified;

♦ The first time a person is brought before a judge; the timescale for being brought to the court, the conditions of independence for the judicial body; the consideration procedure; the grounds for remand in custody; ensuring the possibility of effective defence; notification about the argumentation of the procedural opponent; the powers of the court with respect to allegations of torture;

♦ Appeals against detention and period review of detention; access to the court; the legal ramifications of declaring detention unlawful;

♦ Access to a lawyer while in custody and the possibility of confidential correspondence with ones lawyer;

Particular attention has been paid to identifying the possibilities in legislation for «concealed» forms of deprivation of liberty. This refers, for example, to norms which create the possibility for effectively depriving somebody of their liberty while not being classified in legislation and practice as «detention» (for example, the so-called being brought to a police station and then detention in custody «for review» before a protocol on detention is drawn up; the right to have a person released on bail detained). The use of a number of undefined terms, such as, for example «dostavlennya» [«bringing to»] creates the possibility for fairly easily manipulating the law in order to extend detention beyond the legally established limit, or deprive a person of their liberty without adequate grounds.

As a result of this analysis, draft laws and amendments were prepared to the following: the Criminal Code and Criminal Procedure Code, the Code of Administrative Offences and other normative acts.

The 2004 sociological study mentioned above found that in the previous year 355,293 people had suffered beatings or bodily injuries during an investigation, while 93,498 people had in analogous circumstances been subjected to torture with the use of special means. 56,099 people had been beaten by cellmates on the instructions of the police.

The likelihood of becoming a victim of unlawful coercion by police officers, according to the research, is fairly high: for those held in pre-trial detention centres there was a 65% likelihood, in temporary detention facilities – 57%, for individuals brought to a police station as a suspect – 36%, for those detained on the street and frisked – 31%, while for a witness, summoned to appear at a police station – the likelihood was 8%. Even, if a person had never encountered such a situation, there was still a 1% probability that he or she would become the victim of unlawful coercion by police officers.

The most common forms of physical coercion during detention were ill-treatment, torture, and beatings while in the course of criminal investigations the most widespread were beatings and inflicting of bodily injuries, to a lesser extent, torture and torture using special means or techniques. The most common forms of psychological coercion are degrading treatment; intimidation; threats, including towards close relatives; blackmail.

One of the important tasks of the campaign was to publish and circulate among specialists working in the criminal process full and detailed information about the jurisprudence of the European Court of Human Rights. There is a clear need for this and a lack of information about the European Court's case law, specifically full publications of judgments in Ukrainian or Russian.

Although there were recently publications of some judgments in translation, this fragmentary information cannot satisfy the researchers' demand or practical needs. Lawyers have an extremely unclear idea of the means provided by the European Convention, and as a result seldom turn to its provisions in their practice. Domestic courts which should play a key role in effective implementation of the European Convention, adopt a restrained position as regards its application. One of the reasons for this is the lack of full and accurate information about the entire system of jurisprudence of the European Court of Human Rights. KHPG therefore prepared digests of Judgments of the European Court of Human Rights on violations of Articles 2, 3 and 5 of the

European Convention for the Protection of Human Rights and Fundamental Freedoms, and published 1000 copies of each digest. These are especially useful in the light of the changes in the system of domestic criminal law which took place in 2001, particularly given the introduction of court review of arrest and detention of an accused person. The lack of firmly established practice and prevalence of outmoded theories make the judgments of the European Court an invaluable guide for those working in the field.

However, as well as these digests, a general idea about international, and in particular, European mechanisms for preventing torture is needed. KHPG therefore also wrote and published two books to fill this gap. The first: «International mechanisms for preventing torture and ill-treatment» presents UN mechanisms and includes the text of the UN Convention against Torture, explanation regarding the work of the UN Committee against Torture, Ukraine's Third and Fourth Periodic Reports, commentaries from human rights organizations on these reports, as well as material from the discussion of the reports at the UN Committee against Torture sessions. The second «European mechanisms for preventing torture and ill-treatment» focuses on Council of Europe mechanisms. It contains texts of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols; recommendations on how to prepare an application to the European Court of Human Rights; the text of the European Convention on the Prevention of Torture and Ill-treatment, information about the work and the standards of the Committee for the Prevention of Torture [CPT], as well as analytical articles providing an overview of Court practice with respect to Articles 3 and 5, and an analysis of whether Ukrainian legislation complies with these.

Overall KHPG published, within the framework of the second stage of the campaign, 60 academic and reference works, including 9 books in the series «Against torture», three volumes of «Judgments of the European Court with respect to Ukraine», 30 brochures from the UN series «Human Rights Fact sheets».

These publications were handed out to participants of training seminars run by KHPG and other network members for representatives of the target groups – law enforcement officers, judges, lawyers, and members of civic organizations. Speakers at these seminars included the Deputy Minister of Justice Valeria Lutkovska, judges of the Supreme Court Vasyl Filatov and Sviatoslav Mishchenko, representatives of the National Bureau on Adherence to the Convention (a subdivision of the Ministry of Justice) and defence lawyers. From 2003 to 2006 41 seminars and training courses were held for various target groups in many Ukrainian cities, including 10 seminars for law enforcement agencies; 12 training seminars for lawyers; 3 training seminars on access to information and 4 seminars for human rights activists. These events were attended by over 1.5 thousand people. Such awareness-raising activities have resulted in a greater level of professional skills among lawyers who have begun using the judgments of the European Court much more in their argumentation, and are more willing to take part in this category of cases. One can hope that judges and law enforcement officers will also take the information received into account and begin applying European standards in their practice.

No less important was the dissemination of information about cases of torture and combating them among the wider public. KHPG, together with the nationwide TV company Studio «1+1», produced several programmes in the popular weekly talk-show «Double evidence» and «Without taboo», which judging by publications in the press received good ratings.

One may thus conclude that KHPG and its partners achieved considerable success over those years. However concern remains over such problems as impunity in cases of use of torture, conflict between the different functions of the Prosecutor hampering effective investigation into cases of torture; routine practice which violates the right to liberty and the rights of detainees and the wide-scale use of coercion in penal institutions; The lack of an integrated system for prevention of torture and ill-treatment undermines constitutional guarantees. Furthermore a number of features of the domestic legal system indirectly contribute to the use of torture. These shortcomings in the system allow and / or encourage torture. The campaign must therefore be continued in order to create an effective system of prevention of torture and other forms of ill-treatment. The next stage will seek to achieve the following results:

More effective practice in investigating likely cases of torture and reducing the likelihood of impunity for the perpetrators of torture;

Work on ensuring that conditions are clearer for legitimately detaining people, and periods of detention in police custody before being brought before a :judge becomes shorter and more under the control of the judiciary;

More effective judicial control over the work of law enforcement agencies both during the main judicial examination and in the course of other court procedure;

The courts will begin relying in their rulings more on international and European standards of protection from torture and defence of the right to liberty;

More clarity will be provided in legislation and the gaps removed which make the use of torture possible and allow impunity for those public officials implicated.

5. RECOMMENDATIONS

Of the recommendations from last year's report, only that calling for immediate ratification of the Optional Protocol to the UN Convention against Torture was implemented. Therefore all other recommendations remain in force:

– adopt at legislative level a concept for creating a system of prevention and protection from torture and ill-treatment, as well as an action plan, based on the said concept, with clearly defined directions and stages of activity;

– bring the elements specified of the crime of «torture» into line with Article 1 of the UN Convention against Torture;

– institute the gathering of statistical data in courts and law enforcement agencies on crimes which contain elements of «torture» in the understanding of Article 1 of the UN Convention against Torture;

– make it impossible to apply amnesty and parole for people who have committed actions, which have elements of «torture» in the meaning of Article 1 of the UN Convention against Torture;

– promote the creation of effective mechanisms of public control over investigations into allegations of torture and ill-treatment;

– provide by legislative means for the activities of non-governmental experts and expert bureaux;

– ensure access by victims to medical documents which are of importance in proving torture or ill-treatment;

– assign the same validity as evidence to conclusions provided by independent medical and other experts, who conduct studies at the request of the alleged victim of torture or their legal representative, as that of conclusions made by experts assigned by an investigator or court;

– provide individuals who initiate an investigation or other legal procedure regarding allegations of torture or ill-treatment access to free legal aid should they be unable to pay for the services of a lawyer;

– introduce provisions in Ukrainian legislation on the inadmissibility of any testimony of the accused (suspect) received at the pre-trial stage of the criminal investigation without a lawyer being present;

– provide the appropriate guidelines to prosecutor's offices and judges for using measures to ensure the safety of individuals who have made an allegation of torture, in particular, if such an individual is held in custody, then to move him or her to another remand centre;

– eliminate the practice whereby judges «extend detention» of suspects held in police custody, or, at least, introduce necessary amendments in order to transfer people whose detention is extended by a judge to a pre-trial detention centre, and not leave them held in police custody;

– introduce into legislation the right of access and the appropriate procedure for gaining access to an independent doctor and independent expert of the person detained's own choosing, especially for persons, who are held in custody;

– review provisions of current legislation in order to provide the right to legal representation to people who make allegations of torture, regardless of whether or not criminal proceedings are initiated;

– provide clear guidelines to prosecutor's offices and judges concerning immediate consideration of claims and complaints related to investigations into torture;

– give individuals facing deportation to another country the right to court review of an appeal against the relevant decision of executive bodies, and appropriate court procedure capable of investigating the circumstances which could significantly influence the decision on deporting (extraditing) the individual to the other state.

III. THE RIGHT TO LIBERTY AND SECURITY[1]

Legislation on protecting the right to freedom from arbitrary detention and arrest did not change in 2006 and the first half of 2007, nor was there any change in practice. Just as before, the number of people detained on suspicion of committing a crime is considerably higher than the number of those actually convicted. Detention without a court order remains the rule and those cases where a court order is obtained – the exception. This is despite the clear statement in Article 29 of the Constitution to the contrary. The vast majority of all «criminal-procedure» detentions are thus unlawful. One of the objectives of such detentions remains obtaining a confession with the entire detective inquiry and criminal investigation system built on gaining such confessions. The means used to obtain these are those same unlawful methods which have become habitual for the police, the prosecutor's office and the courts.

For example, the practice remains widespread of unregistered detention, when a person is taken by force to an investigative body, however the detention is not formally registered, and the detained person remains in the control of the police without any of the guarantees inherent in the status of a person detained. Observations suggest that such practice has become even more common since the entry into force of the Law from 12 January 2005 which establishes much stricter time restrictions on the period a detained person may be held by the police. Such unregistered detention is not treated by the court and prosecutor's bodies as deprivation of liberty and therefore people who have become the victims of similar detentions are virtually without legal defence.

These unregistered detentions are possible given the fact that the beginning of «criminal-procedure» detention is considered to be the moment at which a protocol of detention is drawn up. When this takes place is entirely at the discretion of the official running the investigation.

Order № 300/73 of the Ministry of Internal Affairs [MIA] and the State Department for the Execution of Sentences from 23.04.2001 «On observance of the law when detaining persons suspected of an offence, the choice of pre-trial detention as a preventive measure and observance of the statutory periods for detention and custody during pre-trial investigations» remains in force. Item 2.5 of this Order classifies the release of individuals from temporary holding facilities (ITT) due to suspicion against the person having proved unfounded as a violation of legality. This provision is encouraging police officers to use «shadow» detention. They detain a person whom they suspect of having committed a crime, take them to the police station and «work» with them, often applying unlawful forms of pressure, and then either formally fill in a protocol of detention or release the person, having extracted a signed statement that the person has no complaints against the police.

At the same time norms of the Constitution and criminal procedure legislation stipulating the right for a third person to be informed and a lawyer called are ignored. The detained person is supposedly questioned as a witness, and legislation does not stipulate the right to a lawyer in the case of witnesses. The refusal of a person detained to give evidence on the basis of Article 63 of the Constitution and Article 69-1 of the Criminal Procedure Code [CPC], or insistence on only answering questions with a lawyer present, as a rule enrages the police officers and prompts the use of torture. Moreover, law enforcement personnel try to twist the meaning of Article 63 of the Constitution. For example the MIA management sent staff at the local level an unlawful explanation as to the

[1] Prepared by Arkadiy Bushchenko, lawyer and legal expert for KHPG on Criminal Process and the European Court of Human Rights and Yevhen Zakharov, Co-Chair of KHPG and Head of the Board of UHHRU

sense of this Article. After presenting the norms of Articles 69 and 69.1 of the CPC and Article 63 of the Constitution, it literally states:

«The following are entitled to refuse to give testimony:

1. members of the family, close relatives, adopted children or adoptive parents of the suspect, accused or defendant;

2. a person who would incriminate him or herself through this testimony, members of his/her family, close relatives, adopted children or adoptive parents, of having committed a crime.[2]

Effectively, according to such an interpretation, any person who uses the right to refuse to testify is guilty of a crime or the relative of a criminal.

The lack of a lawyer deprives the detained person of any defence. S/he is totally dependent on law enforcement officers. This gives the latter the chance to apply psychological or physical pressure, as well as torture.

Furthermore the presence of a lawyer during interrogations is a legal requirement for certain categories of detainees (minors, people who have psychological illnesses, the rehabilitated, etc).

Legal assistance through the appointment of a defence lawyer paid for by the State. This requirement is not fulfilled in practice as can be seen by the payments for such work by lawyers actually allocated from the Budget. According to figures from the Ministry of Justice, in 2006 20 Regional Departments of Justice sent information about services provided by lawyers in criminal prosecutions amounting to 163.7 thousand UAH.[3] Even the pitiful amount of 2 million UAH foreseen in the Budget for legal aid in criminal cases in 2006 was not spent due to the extremely inefficient system for providing such aid. The system allows for payment of 15 UAH for one day's work, and in order to receive this pathetic amount, the lawyer must present three documents to the Regional Department of Justice. It would therefore be more accurate to speak of the effective lack of State-funded legal aid for people detained.

The problem of people turning down their right to defence concerns not only those detained but all individuals viewed as suspects (accused). The waiving of ones right to defence is not envisaged in current legislation. Yet law enforcement officers use an unlawful interpretation of Article 46 of the CPC to encourage people to waive this right.

Article 46 of the CPC states that the suspect, person accused, or defendant has the right at any moment of the proceedings to reject invited or appointed defence counsel (i.e. to reject a person, not defence per se). This rejection is allowed only at the initiative of the suspect, person accused, or defendant and does not deprive the person of the right to ask for the services of another defence lawyer at later stages of the trial. It is clear that the article merely entitles an individual to turn down a specific invited or appointed defence lawyer. Yet law enforcement officers interpret this norm as forcing an individual for turning down defence altogether, when defence counsel has not yet been invited or appointed. This practice is so widespread that forms have even been prepared with protocols rejecting legal defence. Each investigator has such a form ready on his/her computer. The grounds are given as being: «I will defend my rights myself». As we see, law enforcement officers thus replace the «rejection of a lawyer» with «rejection of defence» which is nowhere envisaged in the law.

Previously, in order to acquaint a person with their rights and obligations, those detained were handed two sheets of paper with the texts of some Articles of the Constitution and the CPC. MIA №338 from 18 April 2006 approved instructions regarding a list of basic rights which police officers must read out when detaining a person on suspicion of having committed a crime, and instructions on the list of basic rights which must be read out in the case of administrative arrest. However, in our view, this change has not improved the level of protection of those detained.

The courts can extend the period of detention to 10 days, and, at the application of the detained person, to 15 days. Judges often apply this measure so that the police can obtain additional evidence of the person's being implicated in a crime, if the evidence provided by the prosecution is insufficient for making a decision to remand the person in custody.

[2] http://www.khpg.org/en/index.php?id=1171706224&w=Ruslan

[3] Letter from the Ministry of Justice №C-8055-38 from 21.05.2007.

The police also make use of administrative arrest for criminal investigations. For example, if a person refuses to go to the police station without the proper summons, they are forcibly taken there, and later a protocol on an administrative offence is drawn up under Article 185 of the Code of Administrative Offences (CAO) for the persistent refusal to comply with the lawful instructions or demand of a police officer carrying out his/her duty. This is punishable by a fine or corrective work, and if the circumstances of a case, taking the individual offender into account, make the use of these measures insufficient, by administrative arrest for up to 15. The courts usually support the use of administrative arrest regardless of the offender. This is encouraged by the fact that according to Article 287 of the CAO, the judge's ruling on imposing administrative punishment is final and not subject to appeal. The police in this way achieve their aim of keeping the suspect under their total control for the entire period of the administrative penalty, and «working» with the person to obtain the needed confession. Overall during 2006, 31,407 people were detained with administrative protocols drawn up under the offence defined in Article 185 of the CAO.

Administrative arrest for criminal investigations is also used by applying Article 263 of the CAO. In such cases a suspect is detained for a period of up to 3 days under Article 263, then when this period expires, is detained again, this time under Article 115 of the CPC. It is also quite common for employees of law enforcement agencies, after the court has refused to allow an application for remand in custody and has freed the detainee to immediately detain the person on «new suspicion».

Law enforcement agencies retain considerable authority to hold those suspected of having committed an administrative offence for a fairly prolonged period. Article 263 of the CAO states that «individuals who have infringed regulations concerning the use of narcotics or psychotropic substances» can be detained for a period of up to 10 days with the sanction of the prosecutor's office, if the offender does not have documents proving his or her identity.» Nor is a warrant required for detaining and holding vagrants or beggars in custody on the basis of Article 11 of the Law «On the police». Through the lack of clarity in legislation with regard to the term «vagrant», many people are held in centres for the reception and distribution of vagrants purely on the grounds that they could not, when asked by a police officer, produce documents confirming their identity. We have come upon people in centres for the reception and distribution of vagrants who had a permanent place of residence and a steady job. It should be mentioned that over the last two years the number of people held in MIA custody on suspicion of being vagrants or begging has significantly fallen. According to MIA figures, throughout 2003 23.6 thousand people were held, in 2004 – 32.2 thousand, in 2005 – 17.2 thousand, while in 2006 the figure stood at 15.4 thousand.[4]

The shortcomings with regard to detention for the purpose of extradition, as well as detention of foreign nationals, discussed in the Report «Human Rights in Ukraine – 2004» still remain.

The above-mentioned failings in legislation and practice have been well-known for a long time, and draft laws have been drawn up which should improve the situation. A new draft Criminal Procedure Code has been prepared for its first reading in parliament. Political will is needed to improve the situation. However political instability, struggles between different political forces are relegating such issues to second place, with the unlawful behaviour of law enforcement officers who flagrantly violate the right to personal liberty goes unpunished. In 2006 21 offences were registered with criminal proceedings being initiated under Article 371 of the Criminal Code (knowingly unlawful detention, bringing somebody in for questioning, arrest)[5]. Prosecutor's offices launched 5 criminal investigations over unlawful detention.[6]. In response to the UN Committee against Torture, the Government answered that the reason why there had been no response to 1400 complaints made by people who had been detained since 2002, why nobody had yet been prosecuted and why compensation had not been paid the victims could be that the complaints were unfounded.[7] At the

[4] MIA letter №10/3-C-1714 from 02.06.2007.
[5] MIA Letter №C-161 from 07.06.2007
[6] CAT/C/UKR/Q/5/Rev.1/Add/1. Written replies by the Government of Ukraine to the list of issues (CAT/C/UKR/Q/5/Rev.1) to be taken up in connection with the consideration of the fifth periodic report of Ukraine (CAT/C/81/Add.1), p. 153.
[7] CAT/C/UKR/Q/5/Rev.1/Add/1. Written replies by the Government of Ukraine to the list of issues (CAT/C/UKR/Q/5/Rev.1) to be taken up in connection with the consideration of the fifth periodic report of Ukraine

same time, in response to an information request from KHPG, the Ministry of Internal Affairs reported that «in 2006 there were 192 complaints about police behaviour from people held in custody of which 3 were found to be totally justified, 4 partially, 10 people had their statements rejected, and 165 were not found to be justified.»[8]

It should be noted that pilot offices for providing legal aid to people detained began functioning in 2006. This was in accordance with a Strategy Plan for creating a free legal aid system drawn up by the National Commission for the Strengthening of Democracy and the Rule of Law and signed into law by Presidential Decree. The project is supported by civic organizations and financed by the International Renaissance Foundation, the Legal Initiative of the Open Society Institute (Budapest) and the Viktor Pinchuk Fund.

The first pilot offices were opened in Kharkiv and Bila Tserkva and another office is due to be opened in Khmelnytsky in the second half of 2007. The offices will provide free legal aid to all people detained and agreements to this effect have been made with the relevant regional departments of the Ministry of Internal Affairs and civic organizations who will be responsible for the work the offices do.. The proposed model of legal aid should be worked out in the pilot offices and then presented in ready form for use by public bodies. The first months of the pilot offices' work graphically demonstrated all the problems linked with detention described above. There has also been an increase in the number of court rulings finding detention to have been unlawful, with lawyers working in the pilot offices explaining the grounds for their complaints to judges.

One such example would be the case successfully defended by G.V. Tokareva resulting in a ruling on 13 May 2005. Ms Tokareva was able to demonstrate to the court that her client had been unlawfully detained without a court warrant on suspicion of having committing a crime. The fact that the crime had been committed long before the person was detained was a clear violation of Article 29 of the Constitution[9]. The court found in the claimant's favour and declared that his detention in a SIZO [pre-trial detention centre] had been unlawful.

RESOLUTION

13 May 2005

The local Ordzhonikidzevskiy district court of Kharkiv consisting of:

chairman – judge A. Klimenko, secretary L. Valkovksaya; with participation of: prosecutor K. Yarmak, advocate G. Tokarev, investigating officer T. Kuts, considered at the opened court sitting in the city of Kharkiv the complaint of advocate Gennadiy Tokarev in the interests of his client H. against the illegal detention of the suspected of commitment of a crime.

RESOLVED:

The organ of pre–trial investigation accuses H. of commitment of the crime envisaged by part 3 of Article 187 of the Criminal Code of Ukraine. On 6 May 2005 the Ordzhonikidzevskiy district court of Kharkiv took the decision about the preventive measure regarding H. in the form of holding in custody in temporary detention center No. 27 of the Kharkiv region.

On 10 May G. Tokarev , the advocate of the accused, handed to court a complaint about illegality of the detention. In this complaint the advocate demands to recognize as illegal the detention of his client H. by the officers of the Ordzhonikidzevskiy district department of the Ministry of Interior, referring to the following arguments:

(CAT/C/81/Add.1), p. 253.

[8] MIA Letter №16/1K-C-169 from 20.06.2007

[9] The relevant part of this Article states: «No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law. In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours»

– the norms of the Criminal–Procedural Code of Ukraine does not establish the authority of an inquiry organ or an investigating officer to detain, without judge's permission, a person on suspicion of a crime after its commitment, and detention by the investigating officer of his client on suspicion of a crime, committed long before the moment of detention, is an obvious violation of Article 29 of the Constitution of Ukraine;

– factual detention of H. took place in evening of 1 May 2005 at the place of his residence; since that moment he has been continuously hold in custody during 120 hours before his transportation to court (on 16 May 2005 at about 17:00) without the observance of procedural order of detention, both in the framework of administrative and criminal proceedings;

– the protocol of H.'s detention in accordance with Article 115 of the CPC of Ukraine contains the reasons of the deten–tion, which are not stipulated by laws.

Prosecutor regarded the arguments of the complaint as ungrounded, and the complaint – as not liable to consid–eration. He explained that on 1 May 2005 H. had been transported by militia officers to the Ordzhonikidzevskiy district department of the Ministry of Interior in the Kharkiv region in the connection with family brawl, which had occurred at the place of his residence. During the personal search the law–enforcers found in the pockets of H.'s clothes and seized a substance of vegetative origin, and because of this H. was detained for the term up to 3 days according to the procedure envisaged by Article 263 of the Administrative Code of Ukraine as a person suspected of storage of narcotic drugs. On 4 May 2005 the experts of the laboratory of the Kharkiv regional department of the Ministry of Interior of Ukraine came to the conclusion that the substance, confiscated from H., was not a narcotic or psychotropic drug. In this connection, on 4 May, at about 8 p.m., H. was released and at once detained repeatedly by investigating officer T. Kuts in accordance with the procedure established by Article 115 of the CPC of Ukraine as a person suspected of committing a crime envisaged by part 2 of Article 187 of the Criminal Code of Ukraine.

Investigating officer of the Ordzhonikidzevskiy district militia department T. Kuts also reckoned that the complaint was groundless. She explained to court that immediately after H.'s detention in accordance with Article 115 of the CPC of prison, at 20:10, he had been familiarized with his constitutional and procedural rights, including the right to meet advocate from the very moment of detention, proper protocols had been compiled, after which he had been interrogated as a suspect.

The accused was not brought to court, since for transportation from temporary detention center No. 27 the investiga–tion officer had to hand the corresponding application three days before the event, and the notification about consid–eration of the complaint was received by the investigating officer only on 11 May 2005.

Having listened to the claimant, prosecutor and the investigating officer in charge of the criminal case of H., having analyzed the materials of the case, having checked and assessed the collected proofs, the court reckons that the complaint is valid and must be satisfied.

The court have established that on 1 May 2005, about 4 p.m., the officers of the Ordzhonikidzevskiy district de–partment of the Ministry of Interior in the Kharkiv region, who came by call to H.'s dwelling because of a family brawl, transported H. to the Ordzhonikidzevskiy district department. In the course of personal search detective of the district department Bondarev found a substance of vegetative origin in the pockets of H.'s clothes. Protocol about confiscation of this substance was compiled. In compliance with Article 263 of the Administrative Code of Ukraine, on 1 May 2005, at 10 p.m., H. was detained for the term up to 3 days as a person suspected of violation of the rules of circulation of narcotic drugs. On 3 May 2005 the confiscated substance was directed for expertise to the scientific institute of expertise at the Kharkiv regional department of the Ministry of Interior. According to expert's conclusion No. 1270 of 4 May 2005, the substance, confiscated from H., was not a narcotic or psy–chotropic drug, in which connection on 4 May at 20:00 H., as a detained according to the Code on administrative offences, was released. Yet, he was at once detained by the investigating officer of the Ordzhonikidzevskiy district department of the Ministry of Interior on the basis of Article 115 of the CPC of Ukraine on suspicion of commit–

ment of the crime envisaged by part 2 of Article 187 of the CC of Ukraine. The detention was based on the reason that the suspected was «caught after commitment of a crime»; the motive of the detention was prevention of the possibility of the suspect to hide. On 6 May 2005, about 6 p.m., the Ordzhonikidzevskiy district court of Kharkiv satisfied the appeal of the investigating officer of the district militia department, and the preventive measure in the form of holding in custody was chosen regarding H.

Detention of a person suspected of commitment of a crime is realized by an investigating officer in compliance with Article 115 of the Criminal–Procedural Code of Ukraine with observance of the demands established by Article 106 of the CPC of Ukraine.

Article 106 of the CPC of Ukraine contains the exhaustive list of circumstances, which can be the ground for detention of a person suspected of commitment of a crime. One of such grounds is detention of the person immediately after commitment of the crime. According to the accusation, preferred to H., he committed the crime envisaged by part 3 of Article 187 of the CC of Ukraine on 12 April 2005. Detention of H. by the investigating officer on the basis of Article 115 of the CPC of Ukraine took place on 4 May 2005, which in no way cannot be regarded as detention immediately after commitment of the crime.

According to protocol of detention of H. on the basis of Article 115 of the CPC of Ukraine, his detention was motivated by the reason that H. could hide from investigation and court. Such reason is not envisaged by Article 106 of the CPC of Ukraine as a ground for detention of a person suspected of commitment of a crime. No data, which confirmed that at the moment of H.'s detention by the investigating officer (8 p.m. of 4 May 2005) he had tried to escape from law–enforcers, were not presented to court. On the contrary, it was established in the course of the trial that before this moment H. had stayed in the building of the Ordzhonikidzevskiy district militia department as a person detained in the framework of legal proceedings on an administrative offence and, according to the book of registration of the detained of the Ordzhonikidzevskiy district militia station, he, in fact, had not been released at 8 p.m. of 4 May 2005, but was at once passed to investigating officer T. Kuts.

Under such circumstances the court reckons that the detention of H. on the suspicion of commitment of a crime by the investigating officer of the Ordzhonikidzevskiy district department of the Ministry of Interior in the Kharkiv region on 4 May 2005 at 20:00 on the basis of Article 115 of the CPC of Ukraine was carried out with violation of the demands of Article 106 of the CPC of Ukraine and was illegal.

Being governed by Articles 106, 115, 165–2 of the CPC of Ukraine, Article 29 of the Constitution of Ukraine, the court –

RESOLVED:

To satisfy the complaint of advocate Gennadiy Tokarev in interests of his client H. against illegality of the detention of the suspect of commitment of a crime.

To recognize the detention carried out on 4 May 2005 by the investigating officer of the Ordzhonikidzevskiy district department of the Ministry of Interior in the Kharkiv region on the basis of Article 115 of the CPC of Ukraine of H., suspected of commitment of the crime envisaged by part 3 of Article 187 of the CC of Ukraine, as illegal.

Appeal against this resolution can be handed to the Appeal court of the Kharkiv region through the district court within 7 days.

Judge: A. Klimenko

Conditions in police custody remain a major problem. MIA mobile groups, together with people from human rights organizations, have examined over 100 temporary holding facilities [ITT] in 14 regions. They found infringements of minimal norms of international standards for police custody in almost all cases.

As of 1 February 2007, there were 536 specialized police premises (487 temporary holding facilities; 36 centres for the reception and distribution of vagrants; and 13 special reception centres for people under administrative arrest). Each day around 6,000 people detained or remanded in

custody are held in these places where the conditions do not comply with international standards which are binding for Ukraine. 127 out of a total of 501 ITT need repairs and reconstruction to bring them into compliance, and 57 are presently not functioning in order for this work to be carried out. The MIA was forced to close down 9 ITT altogether since there was no possibility of carrying out the needed repairs and reconstruction work. The MIA drew up a programme for building, reconstruction and repairs to special police premises for 2006 and following years which was approved with MIA Order No. 1001 on 15.11.2005, with the cost estimated at 250 million UAH. The implementation of this programme will make it possible to do repairs to 90 temporary holding facilities, and continue construction of 24 buildings in 16 regions. 30 million UAH was scheduled to be allocated from the State Budget in 2006 and 7 new buildings and 24 existing ITT were supposed to have been completed by the end of the year. However only 30% of this amount was allocated and the money only began arriving in November 2006. This clearly suspended the work on repairs and reconstruction of ITT.

When courts are deciding whether to remand a person in custody or release him or her pending trial, the presumption in favour of remand in custody has considerable impact. If the individual is accused of having committed a crime for which the punishment is over 3 years imprisonment, then only factors linked with an individual's poor state of health or other exceptional circumstances decide in favour of release pending trial.

There was no change with regard to access of individuals remanded in custody to the courts, since legislation continues to lack any concept of periodic review of the grounds for remand in custody. Limitations on the right of an individual remanded in custody to review of the lawfulness of his/her deprivation of liberty run's counter to Ukraine's Constitution and its international commitments. The procedure established by legislation allows for an individual to be held in custody without court review as to whether such a preventive measure is necessary for up to 9 months. During the period between the conclusion of the pre-trial investigation and the commencement of court proceedings, the accused is held in SIZO without any court warrant at all, which is an undoubted infringement of Article 5 of the European Convention on Human Rights and Fundamental Freedoms.

Legislation still fails to guarantee fundamental procedural rights of the accused (suspect) during a court review of the question of remand in custody or release pending trial enabling him or her to defend, his/her right to remand at liberty. Nor is the participation of the remanded person even guaranteed in all court hearings. The general condition of the system of legal aid in Ukraine deprives many of the possibility of receiving qualified legal assistance.

The court hearings held in accordance with Articles 165-2 and 165-3 of the CPC do not ensure «equality of arms» of the prosecuting and detained parties. The rights of the detained person, guaranteed by Article 5 of the European Convention on Human Rights, namely the right to know the arguments of the other side, the right to see all material which the other party's arguments are based on, the right to adequate time to prepare their position and the right of response to any additional arguments presented during the court proceedings, are not ensured.

Legislation still establishes a time limit for remand in custody only for the pre-trial investigation, not for the stage of court proceedings. Therefore the duration period of the trial directly affects the overall duration of remand in custody.

No progress has been seen in approach to the use of alternatives to remand in custody, such as release on bail. The amount of bail continues to depend on the possible amount of damages sought by the victim, which additionally gravitates against the choice of this preventive measure. Furthermore, legislation does not provide clear norms on resolving the question of bail.

The lack of clear procedure for applying bail makes it especially difficult to choose non-pecuniary forms of bail, and the courts are reluctant to do so. Another contributing factor is the instruction of the Plenary session of the Verkhovna Rada in Resolution № 6 from 26.03.1999 (Item 5): *«The property must be of good enough quality, as well as have the legal status to ensure that the enforcement of a court ruling depriving the accused, suspect, defendant or person on bail of the right of ownership to the said property shall not create any difficulties.»*

RECOMMENDATIONS

Not one of the recommendations made in last year's report was implemented, and they therefore all remain current.

1. Introduce amendments to legislation which would make detention without court sanction the exception, this being in compliance with the restrictions provided for by Article 29 § 3 of the Constitution

2. Bring the time limit for bringing a person before the court, set down in Article 106 of the CPC, into line with Article 29 of the Constitution, taking into account the time necessary for the judicial examination and ruling;

3. Define the starting point for detention on suspicion of committing a crime or an administrative offence based on the actual circumstances of the case, not on the decision of a law enforcement officer;

4. Define in law separate criteria of legality for detention and remand in custody and annul provisions in Item 2.5 of the Joint Order by Ukraine's Ministry of Internal Affairs and the State Department for the Execution of Sentences No. 300/73 of 23 April 2001, which considers a detainee's release when the suspicion is not confirmed or when the term of detention has expired as a breach of the law, and other similar instructions;

5. Include in the subject matter of detention hearings circumstances, which address reasons for arrest without warrant, including the following:

– grounds for the suspicion or charge, in connection with which the prosecution demands that the suspect (accused) be detained;

– grounds for the period in which a person is held in custody by a law enforcement agency prior to being brought before a judge.

6. Establish a clear presumption in favour of a person's release and provide that the onus of providing proof of grounds for detention be shifted to the prosecution;

7. Introduce provisions, which would exclude remand in custody or its extension on the basis of purely hypothetical assumptions;

8. Formulate the risks in connection with which detention is allowed in such a way as to exclude remand in custody depending on the position of accused and tactics employed by the defence;

9. Introduce provisions which would exclude the practice of detaining a person after his/her release by a judge on the basis of «concealed» accusations;

10. Formulate the risks in connection with which detention is allowed in such a way as to exclude remand in custody depending on the position of accused and tactics employed by the defence;

11. to introduce amendments into Article 165-2 § 4 of the CPC, in order to exclude detention without court control for longer than the period established by Article 29 § 3 of the Ukraine's Constitution;

12. Introduce provisions which would exclude the practice of detaining a person after his/her release by a judge on the basis of «concealed» accusations.

13. Exclude from legislation the institution of «detention extension» by a judge, or, at least, introduce necessary amendments to the legislation, in order to exclude the practice of returning a person to a police unit after detention has been extended;

14. Introduce amendments to Article 165-2 § 4 of the CPC, in order to exclude detention without court control for longer than the period established by Article 29 § 3 of the Constitution;

15. Introduce amendments to Article 165-2 § 4 of the CPC, in order to exclude detention without court control for longer than the period established by Article 29 § 3 of the Constitution;

16. Establish clear and detailed procedural rules for court review of whether to remand a person in custody or release him or her pending trial, in particular ensuring the following::

– mandatory participation of the person, who has been deprived of liberty, in any detention hearing where the question of his or her remand in custody or release pending trial is being considered;

– the accused and his/her lawyer must be provided with a copy of the investigator's (prosecutor's) request for his/her remand in custody or extension of custody;

– the remanded person and his/her lawyer must be given the right to study the materials, which justify the request for his/her remand in custody or extension of custody.

17. Prepare procedure, which would encourage the use of bail instead of detention;

18. Define more clearly the judge's scope of powers concerning remand in custody, in particular, to establish clearer criteria for exceptional cases, when a judge can go beyond the margin of his/her general authority;

19. Shorten the maximum term of detention during pre-trial investigation

20. Bring the rules of administrative detention into conformity with the requirements of Article 29 of the Constitution;

21. Introduce amendments to legislation which would exclude the use of administrative detention for the purpose of criminal investigation, for example, by providing mandatory release of a person suspected of having committed an administrative offence pending the hearing into the case

22. Introduce amendments to the Code of Administrative Offences (in particular, to Article 26) and other legislative acts, which would exclude police custody of a person without a court order for over 72 hours.

23. Provide procedure for court hearings concerning the detention of vagrants and people begging, or, at least, enable them to appeal against such detention and provide rules for such procedure;

24. Ensure that detention and subsequent remand in custody of a person pending extradition is enforced exclusively on the basis of a court decision, as well as the right of a person remanded in custody pending extradition to periodic review of the detention.

IV. THE RIGHT TO A FAIR TRIAL[1]

The right to a fair trial is guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is not, however, explicitly secured either in the Ukrainian Constitution or in legislation, with only individual aspects protected by law.

This section assesses specific aspects of the right to a fair trial.

During 2005-2006 the President of Ukraine and other high-ranking government officials referred repeatedly to problems in the functioning of the judiciary.

According to sociological surveys, an absolute majority of the public believe that the most important issue in the country is to ensure justice and independent court proceedings. Those who had approached the courts deemed the following to be the court's main problems: excessively long court proceedings (10.4%); lack of responsibility of judges (9.7%); insufficient level of information to individuals (9.5%), expensive lawyers' fees (9.3%). Those who had not had dealings with the courts also believed the main problems to be excessively long court proceedings (16.1%); overly high official expenses (12.9%); the need to pay bribes (12.8%); unfair court rulings (12%); inefficient enforcement of court rulings (11.5%). Thus, inefficiency of the courts' work is deemed an even greater problem than their level of corruption.[2]

Given the long-overdue need for reform of the justice system and the public demand for such from the authorities, in December 2005 the National Commission for the Strengthening of Democracy and the Rule of Law which is a permanent advisory-consultative body under the auspices of the President began drawing up a Strategy Plan for Judicial Reform. On 10 May 2006 the President approved this Strategy Plan for improving the justice system to ensure fair trial in Ukraine in accordance with European standards3, prepared by the National Commission.

Fair court proceedings and adequate protection of human rights and fundamental freedoms are possible only where there is impeccable procedural legislation. However, legal regulation of criminal proceedings has not been reformed since Soviet times. The Criminal Procedure Code of Ukraine from 1960, despite some updating, does not meet European standards with regard to human rights protection. The economic courts examine disputes applying rules which are not in line with contemporary trends in civil legal proceedings. Despite the adoption of the Code of Administrative Justice of Ukraine, a law has yet to be passed on administrative procedure which would define the standard relations between an individual and the authorities (public officials) adherence to which should be verified by the administrative courts.4 Cases involving administrative offences are generally examined with infringements of a number of standards of the right to a fair trial, numerous restrictions on the right to defence and the lack of possibility of appealing a ruling in the appellate courts, etc.

In the case of Gurepka v. Ukraine[5] the European Court of Human Rights stated, in particular, that certain administrative offences due to the harshness of the penalties could effectively be classified

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[1] Prepared by Volodymyr Yavorsky, UHHRU Executive Director.

[2] Analytical report on the results of a study «Corruption and the provision of services in the Ukrainian judiciary». Kyiv International Institute of Sociology, 2006 – p. 4

[3] Presidential Decree from 10 May 2006 № 361/2006.

[4] Item 3, Section 1 of the Strategy Plan for improving the justice system to ensure fair trial in Ukraine in accordance with European standards // Adopted by Presidential Decree from 10 May 2006 № 361/2006.

[5] Judgment of the European Court of Human Rights in the Case of Gurepka v. Ukraine, 6 September 2005 (Application № 61406/00).

as criminal.. «*in the light of its settled case-law, the Court has no doubt that, by virtue of the severity of the sanction, the present case was criminal in nature and the purported administrative offence was in fact of a criminal character attracting the full guarantees of Article 6 of the Convention and, consequently, those of Article 2 of Protocol No. 7*». In this case the European Court also examined the review procedure set out in the Code of Administrative Offences. This procedure, for example, could only be initiated by the prosecutor or on the decision of the president of a higher court. . *Given that this procedure was not directly accessible to a party to the proceedings and did not depend on his or her motion and arguments, the Court considers that it was not a sufficiently effective remedy for Convention purposes.* It therefore found that there had been a violation of Article 2 of Protocol No. 7 to the Convention.

An extremely positive move taken by the authorities in 2006 was the implementation of an open register of court rulings. The law adopted «On access to court rulings»[6] was drawn up by the Centre for Political and Legal Reform and tabled by National Deputy V. Onopenko.[7] The Law envisages the creation of a Single State Register of Court Rulings as a database on open access via the Internet. Only information making it possible to identify individual parties to the proceedings, or information examined in a closed court hearing, will be removed. The mechanisms are also defined on access for individuals who did not take part in the case to the full text of the ruling and the material of the case where the court ruling directly concerns their interests. The Register began functioning on 1 June 2006 and is gradually being built up, although admittedly it was held up during the year due to a lack of funding. Another shortcoming in the database itself is the effective lack of contextual searches among available rulings this restricting their practical application. The user effectively sees only the name of the court, the date of the ruling and the case number. This means that cases cannot be found according to subject.

1. PROBLEMS OF THE COURT SYSTEM

The present system of general jurisdiction courts is not fully in keeping with the constitutional principles of the justice system.

The irrational structure of the system of court institutions and the sharing out between them of jurisdiction quite often leads to disputes being examined by different courts at one level and an unjust restriction of the right to appeal court rulings in specific categories of cases (for example, administrative offences). It is precisely the problem of jurisdiction that experts have identified as one of the main causes of corporate raiding. On the other hand such wide scope for manoeuvre in determining jurisdiction has always been the object of certain manipulation. An irrational court system also leads to disproportionate judges' workloads in different courts and levels.

The number of cases and files on them reaching the courts increases each year. In January – June 2006, the average number of cases received by a single judge of a local general court had increased in comparison with the same period of the previous year and came to 127. (against 116.5 in the first half of 2005). At the same time, there was no significant increase in the overall number of judges of local general courts, with only three more than in 2005. Under such conditions a judge cannot carry out his or her duties without violating procedural time periods stipulated for examining cases.

As a result of the failings of the court system and of procedural legislation, the Supreme Court is inundated with cases which go for years without being examined. There are almost 60 thousands awaiting consideration in the Supreme Court and this figure rises every year. This in turn gives rise to certain manipulation. The Supreme Court does not look at cases in the order that they reached the court, but according to considerations known only to them. For example, some cases are exam-

[6] Law of Ukraine «On access to court rulings» from 22 December 2005 // Vidomosti Verkhovnoyi Rady Ukrainy, 2006, № 15, p. 128. Available in Ukrainian at: http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3262-15. The Law came into force on 1 June 2006 and from 1 January 2008 all court rulings from all courts should be on the register.

[7] V. Onopenko was elected Chairperson of the Supreme Court in 2007. Prior to that he was the Chair of the Verkhovna Rada Committee on legal policy which was the profile committee for almost all draft laws pertaining to the judiciary.

ined within a month or two, while others lie there for several years, even though they arrived a few years earlier. The Supreme Court thus examines only the cases it needs which is unacceptable.

On 22 February 2007 parliament adopted amendments to the Law «On the judiciary» these providing temporary measures to address the above-mentioned problem. Temporary regulations were established for cassation review in civil cases. For example, civil cassation appeals against court rulings and cassation appeals[8] not considered by the Supreme Court by 1 January 2007, aside from those where a preliminary review had been carried out, are to be submitted for examination and judgment to boards of judges of appellate courts of the Autonomous Republic of the Crimea, all regions and the cities of Kyiv and Sevastopol. The composition of such panels of judges shall be determined at board meetings of the appellate courts, this not running counter to their authority with regard to the logistical work of the court. Civil cases based on cassation appeals against court rulings and cassation appeals submitted to the Supreme Court after 1 January 2007 shall be dealt with by the Supreme Court Civil Chamber.

It would seem that such a measure undermines the very concept of a cassation level, and there can be no question of the Supreme Court fulfilling its function of ensuring unified case-law. It is, furthermore, easily foreseeable that by the end of 2007 the Supreme Court will have at least 5 thousand cassation appeals still awaiting review since the fundamental problem still remains.

The creation of an integrated system of administrative courts responsible for defending the rights and freedoms of the individual in their relations with the authorities and their representatives has yet to be completed. These courts should become an effective means for affirming the rule of law and defending rights and liberties against encroachments by the authorities. However their formation is being actively stalled by the Supreme Court which has in general begun speaking out in favour of abolishing them as a separate system of courts.

On 18 December 2006 the Centre for Political and Legal Reform, UHHRU, the Association of Ukrainian Lawyers, the Institute for Civic Society, the Laboratory for Legislative Initiatives and the Civic Network «OPORA» issued a public statement against stalling on creating administrative courts.[9] The open appeal points out that at present only the High Administrative Court is in place, and working with only two thirds of the judges needed. District and appellate administrative courts have been at the organizational phase for two years and cases are not being reviewed. There are no premises available, or if there are, not enough judges have been appointed to enable them to commence work.

2. JUDGES' INDEPENDENCE

One of the key issues for fair court proceedings is the guarantee of judges' independence. This involves, on the one hand, the general guaranties of judicial independence and on the other guarantees with regard to each individual judge. The main criterion for impartiality is financial and administrative independence.

The selection procedure for judges is not transparent which can encourage abuse and dependence of judges on public officials involved in the procedure.

As of 1 January 2007 the number of vacancies for judges in local general courts (except administrative courts) came to 971, of which 452 vacancies (46.45%) were for local general courts; 399 or 41% in appellate general courts; 47, or 4.84% in local economic courts and 73, or 7.51% in appellate economic courts. It is, however, impossible to find advertisements anyway for these vacancies, nor procedure by which one could apply for a position.

The State Judicial Administration of Ukraine (SJAU) drew up Regulations on the procedure for creating a reserve of candidates for judge vacancies, which was agreed through the decision of the Council of Judges of Ukraine on 7 July 2006 No. 32, approved by SJAU Order No. 79 from 4 August 2006 and registered with the Ministry of Justice on 21 August as № 991/12865. However, full reform of this procedure will only become possible after amendments are passed to the Law on the Status of Judges.

[8] The latter refer to cases where the Supreme Court acts as appeal level where an appellate court was the first instance court (*translator*)

[9] See: «Creation of Administrative Court System being stalled» http://khpg.org/en/index.php?id=1166304585

There is no clear legally established system for determining judges' remuneration. An inadequate level of material provisions for judges has made such positions unattractive for highly-qualified lawyers. At the same time, the favourable conditions the posts offer for receiving certain benefits which are questionable from the point of view of their legality, are leading to their becoming attractive to people whose aims have nothing in common with the impartial administering of justice.

The inadequate material and social provisions for judges, especially those of local courts, place the independence of judges in jeopardy. This is exacerbated by a lack of appropriate financing of the courts which forces the latter to seek other options for meeting their requirements with regard to a good level in administering justice.

Judges in administrative posts carry out administrative and economic functions not intended for judges. The chairpersons of courts distribute cases among judges, form panels of judges for review of cases, have influence over judges' career issues and social provisions (holidays, bonuses, etc). In view of this, it would be sensible after the elimination of the State Judicial Administration's dependence on the executive branch of power, to make court personnel subordinate to that body. The chairpersons of courts in turn, due to the need to get additional funds for the court, depend on those who allocate these funds: local and central authorities, as well as commercial enterprises.

It is not uncommon for judges in handing down judgment to experience pressure both from the authorities, and from the interested parties. Flawed procedure for instituting criminal proceedings against judges allows this to be used by the accused party in order to exert influence.

An ineffective system of judge accountability in some cases allows them to avoid professional liability, while in others creates favourable conditions for exerting pressure on those judges who demonstrate independence and integrity in their work.

On the other hand, only two cases are known where parliament gave its consent to arrest judges[10]

– Oleh Pampura, judge of the Arbuzynsk District Court in the Mykolaiv region (Verkhovna Rada Resolution from 22.02.2007);

– Zinovy Koval, judge of the Dolynsk District Court in the Ivano-Frankivsk regions (VR Resolution from 13.07.2000).

During the year the President only dismissed three judges in connection with criminal charges.

Administrative pressure is much more often brought to bear on judges via disciplinary proceedings, as well as proceedings over violating their judge's oath. The latter generally provides wide scope for manipulating the wide-ranging content and inexact text of the oath.

From 2003-2005 qualifying commissions of general court judges completed disciplinary proceedings and imposed disciplinary penalties against 250 judges (including 187 reprimands, 22 reductions in their qualification class and 41 recommendations to the High Council of Justice to dismiss the judges. The economic courts' qualifying commission received over 1 thousand appeals on the basis of which 45 disciplinary proceedings were launched and 4 judges received reprimands. The High Qualifying Commission launched 25 disciplinary proceedings against judges of appellate courts.[11]

American Bar Association analysts believe that one of the most serious problems for the judicial system comes from external influences on the judgments handed down by judges. This can take many forms. «The perception of judicial corruption is widespread, and while judges are reluctant to discuss bribery or improper influence from court chairmen and upper-level courts, they are rather straightforward about the interference coming from other branches of government, as well as from prosecutors, advocates, and the media».[12]

Various forms of influence are applied, ranging from letters, telephone calls and personal visits to the judges and chairpersons of the courts, to open criticism of the court rulings in specific cases if they have a different view as to a just outcome. Such non-procedural relations between different parties and the judge are not prohibited by law and are a common occurrence.

[10] Precedents for consenting to the arrest and dismissal of judges // Yurydychna gazeta, № 9 (93), 1 March 2007. Available in Ukrainian at: http://www.yur-gazeta.com/article/934.
[11] Judicial Reform Index in Ukraine (Volume II). December 2005, American Bar Association, p. 61.
[12] Ibid, p. 45.

3. FINANCING OF THE JUDICIARY

It is established practice that the State Budget designates funding for the judiciary which is considerably less than what is needed in order to provide for the real needs of the courts, especially those needs directly related to the administering of justice. Despite the fact that the role and functions of the courts, and their workload, have radically increased, the methods for determining annual expenditure on them have not changed in any significant way over the last many years.

Furthermore, at the present time, the principle of division of power is being violated in the case of the judiciary. Courts administer justice and must be independent of any other branch of power or particular individuals, yet at the same time they are dependent on the executive with respect to financial, material, technological and social issues. This is confirmed by the status of the State Judicial Administration which is a central executive body.

State duty which is paid for applications to the court is not directly channelled to meet the needs of the courts. In general, this duty is too low.

As of 1 January 2007 the court network in Ukraine was made up of 780 courts, of which 665 were local general jurisdiction courts; 13 – military garrison courts; 27 – appellate courts of general jurisdiction; 2 – military appellate courts; 11 – appellate economic courts; 27 – local economic courts; 7 – appellate administrative courts and 27 district administrative courts.

Throughout Ukraine there are 7,672 judges. Of these, 4,622 are in local general jurisdiction courts; 54 in military garrison courts; 1,713 in appellate courts of general jurisdiction; 23 in military appellate courts; 341 in appellate economic courts; 638 in local economic courts;66 in appellate administrative courts and 215 in district administrative courts

Spending from the State Budget on the various types of courts in 2006 can be broken down as follows:

– local economic courts – 120.4 million UAH, of which 66.5 million UAH went on salaries;
– appellate courts – 312.3 million UAH and 142.9 million UAH;
– local courts – 709.9 million UAH and 374.4 million UAH;
– military courts – 24.6 million UAH and14.3 million UAH;
– appellate economic courts – 73.3 million UAH and 37.9 million UAH;
– appellate administrative courts – 8.1 million UAH and 1,3 million UAH;
– local administrative courts – 8.9 million UAH and 2.1 million UAH.

It should, however, be noted that according to figures from the SJAU[13] the level of spending on the direct administration of justice in the 2006 Budget came to 59.7% of actual needs which influenced the organization of the court's work accordingly.

Considerable problems are presented by the incomplete funding of the courts. Even the small amounts allowed for by the Budget do not actually reach the courts. Under-funding of court bodies on 1 January 2007 constituted 87.4 million UAH. The programme for judges' accommodation, for example, failed to receive more than 30% of the planned amount.

On the other hand, a considerable part of funding for the judiciary is not used as intended or with other infringements of legislation. Audits carried out in from 2004-2006 found financial irregularities amounting to 13766.0 thousand UAH including 1432.1 thousand UAH on unlawful expenditure; 954.4 thousand UAH on non-Budget loan indebtedness; 6.8 thousand UAH on untargeted expenses, with other infringements of financial discipline to the sum of 11,372.7 thousand UAH.[14] We are unaware of any criminal proceedings over these violations.

An important development in 2006 was the change in the system for calculating judges' salaries pursuant to the Cabinet of Ministers Resolution No. 865 «On remuneration for judges» from 3 March 2006, and for employees of the system as per CM Resolution No. 268 «On regulating the structure and conditions of payment for employees of executive bodies, prosecutor's offices, courts and other bodies» from 9 March 2006. In 2003 payment of wages rose by 41% in comparison with 2002 in 2004 by 27% against 2003; in 2005 compared with 2004 – by 36%, and in 2006 compared with 2005 – by almost 59.1% Over recent years there has been a reduction in the difference between

[13] Results of the SJAU's work in 2006: http://gca.court.gov.ua/court/info/getfile.php?id=14389.
[14] Ibid.

the average sizes of judges' salaries, between for example, general, appellate and economic courts. As of March 2006 the minimum salary for a judge was 2.5 thousand UAH.

The overwhelming majority of courts are in cramped and unsuitable premises. There are not enough courtrooms, consulting chambers, rooms for remand prisoners brought to the court or defendants, for court managers, for prosecutors and lawyers, witnesses, etc. This means that the premises stipulated by procedural legislation and which are needed in order to properly examine cases are not available. In a lot of cases, judicial examination is postponed, leading to proceedings being dragged out and violation of people's rights and legitimate interests. The court, designed to administer justice, in fact is forced to break the law.

There have been a good few cases where courts newly-created in connection with judicial and legal reforms have simply not been provided with premises which has halted any further measures linked with the reform process.

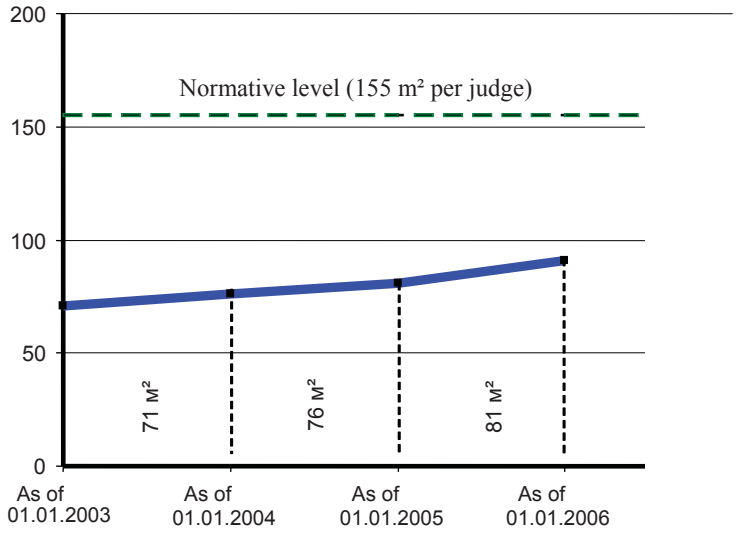
An analysis of how measures envisaged by regional programmes to provide for the running of the courts for 2003-2005 had been implemented was undertaken by the State Judicial Administration.[15]. Their report stated that as of 1 January 2005, 127 courts had been provided with premises, this being 68.3% of the figure planned. It should be pointed out also that a lot of the buildings allocated to the courts are in a fairly questionable state and not especially fit for use. For example, of the total number received by the courts, 96 percent required repair work, more than half (53%) had less space than was required. In March 2006 a panel of the Accounting Chamber concluded, on the basis of their audit of how the money received had been spent, that the programme had not been fulfilled.[16]

«Inefficient management by the State Judicial Administration in carrying out the State Programme, the lack of internal control over its full and timely implementation hampered resolution of the most urgent problems regarding logistical provisions for the running of the courts, as well as material and social provisions for judges and court employees».

The Accounting Chamber does not therefore see the problem as being only insufficient funding, but as also linked with the SJAU's ill-advised use of funds.

In 2006 the SJAU carried out a check of court premises which showed that as of 1 January 2006 out of 786 general courts (except for military courts), only 63 (or 8 percent) were in premises which entirely met the needs of a court. The others needed reconstruction work or new buildings.

The average amount of space in square metres for each judge

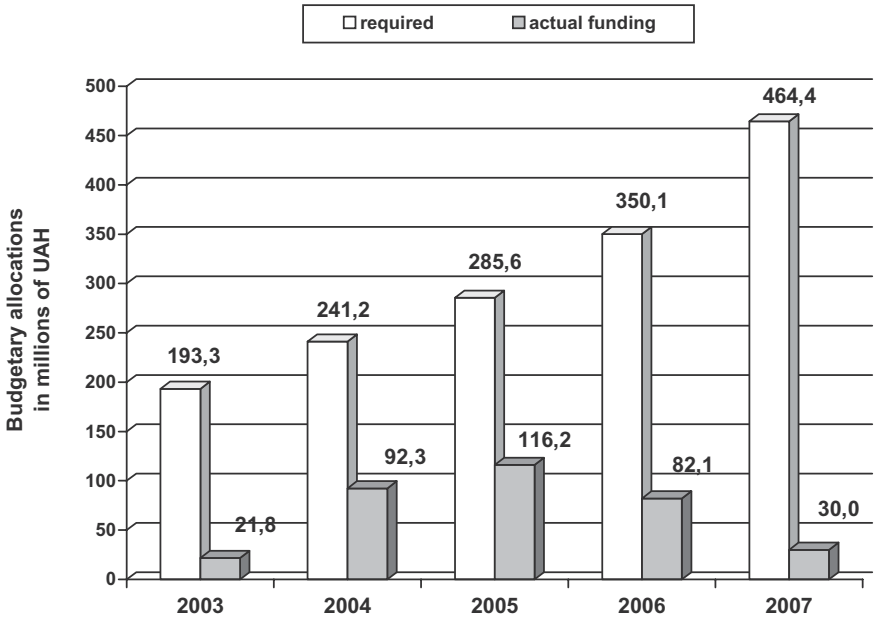


[15] SJAU letter from 31.01.05 № 6-484/05 «On the implementation of regional programmes to provide for the functioning of the courts' work for 2003-2005», which analyzes the level of fulfilment of the President's Instruction from 11 December 2002 № 395 «On measures aimed at providing for the proper functioning of the courts».

[16] Why the courts work badly. Available (in Ukrainian) at: http://helsinki.org.ua/index.php?id=1143645433. A summary in English of the results of the Accounting Chamber's Audit: is available at: http://www.helsinki.org.ua/en/index.php?id=1166174142.

The problem, however, is that the premises allocated require repairs or reconstruction to adapt them to court needs and this remains a certain amount of capital investment. One fourth of them have already had repairs or reconstruction work done, while with the others the necessary work cannot begin due to lack of funds. As a result the majority of buildings allocated to the courts stand for years unheated and unguarded, gradually becoming dilapidated.

Financing of construction, reconstruction and capital repairs of court premises



To achieve a systematic approach to providing court premises, the SJAU drew up a State Programme for providing courts with suitable buildings from 2006-2010, which was approved by Cabinet of Ministers Resolution No. 318 from 4 July 2006. If the Programme is implemented, then all general courts will be provided with premises suitable for administering justice. According to the forecasted breakdown in the amounts for specific measures, the government will need to allocate approximately 2 billion UAH. The Programme envisages the following:

- Reconstruction of 200 court buildings by 2008;
- Reconstruction and additional building work on 313 courts by 2010;
- Construction of 195 new court buildings by 2010;

According to this plan, budgetary funding in 2007 is set at 484.4. However the Law «On Ukraine's State Budget for 2007», only 30 million UAH are allocated towards the implementation of this Programme, this being 6 percent of what is needed.

Provision of court computers is unsatisfactory with only 60% of the needs of general court judges being met, and 75% of economic courts. It should be noted that of the overall number of personal computers available, 20 percent can only be used as not very powerful word processors and need replacing.

Almost all courts have at least one outlet for the Internet and use emails in their work.

4. ACCESS TO JUSTICE

Free access to justice is a constitutional right and the foundation of just legal proceedings. The principle of free access to justice entails the duty of the courts to not refuse to examine cases within their jurisdiction in order to defend a person's violated rights, liberties or interests; convenient location of courts and a sufficient number of courts and judges in the country.

Court costs which an individual will have to bear should not become an impediment to legal defence of his or her rights. This means that the requirement that justice be accessible can only be observed where there is an efficient system of legal aid, especially to those on low incomes.

One of the important conditions for access to justice is the level to which the public is informed about the organization and work of the courts. There can be no accessibility if the judicial system remains complicated and a person doesn't know which court has jurisdiction over his or her case.

At the same time, access to justice does not exclude the possibility for an individual of resolving his or hr dispute without the involvement of the courts. The Government should promote the development of nongovernmental bodies such as Arbitration Tribunals, Mediation, etc with these helping to resolve disputes without going through the courts.

Information about procedure for approaching the courts is not sufficiently available and at times is difficult to understand. The texts of court rulings are largely inaccessible to people who were not involved in the case and yet whose interests are directly affected. Lower level court rulings are virtually not published. Due to the lack of courtrooms, judges often examine cases in their offices; there are infringements of the principle of open court hearings and the technical equipment for recording the proceedings is not available everywhere.

Another aspect of restricted access to justice is the fact that individuals can not lodge appeals with the court against laws, Presidential Decrees and Resolutions of the Verkhovna Rada in cases where their rights and liberties are limited. The said legal acts can only be declared unconstitutional by the Constitutional Court, and individuals do not have the right to lodge constitutional submissions.

There is a significant problem for people living in isolated rural areas to gain access to the courts. Results of a study showed that the overwhelming majority of district [raion[17]] centres in Ukraine are not geographical centres of the districts. This leads to unequal opportunities for rural residents to reach the necessary local court. The lack of public transport routes makes access for rural residents to the courts even more problematical or downright impossible. This means that local (district, city-district) courts continue to be inaccessible for a certain part of the rural population due to both the considerable distances involved and / or the lack of transport between a person's home and the relevant court.[18]

Another related problem can be seen in the creation of district administrative courts, since the proposed districts are too large and clearly inconvenient for some of the parties to court proceedings.

5. THE RIGHT TO DEFENCE

Ukrainian legislation does not provide sufficient safeguards for the individual's right to defence. A particularly large number of problems arise in the criminal process and when examining cases involving administrative offences.

The following are the types of problem areas:

1) The right to choose ones defender and the right to communicate with him or her in private

According to Article 261 of the Code of Administrative Offences, a person does not have the right to meet with his or her defender, and during the subsequent investigation into such a case and examination of the case by the court, the presence of a lawyer is not mandatory. Yet the European Court of Human Rights has in many cases viewed these procedures as being criminal procedural in their essence, meaning that the right of the individual to a fair trial must be applied here as well.

[17] To avoid an abundance of unfamiliar terms, we do not use the Ukrainian terms in this case, but translate oblast as region (other sources sometimes use the word province) and raion as district. There are 24 oblasts in Ukraine, as well as the Autonomous Republic of the Crimea and two cities with special status – Kyiv and Sevastopol. A raion is part of an oblast. Where there is any likelihood of confusion, the Ukrainian word is given in brackets (*translator*),

[18] The project «Improving the access of the rural population to justice»: legal regulation of public access to mechanisms for resolving public-legal and civil disputes (report on the results of a survey) / The Creative Centre «Counterpart», the Civic Society Institute. Compiled by O. Vrublevsky, A. Tkachuk – Kyiv. «Lesta», 2006, p. 13.

Criminal procedure legislature is also inadequate. It all begins with the fact that it is the investigator who issues a decision allowing a defence lawyer to take part in the case. One should also note the difficulty for a defender in communicating with a person in custody. On the one hand a person remanded in custody does have the right to see their defender without others being present, without any limitation on the number of such visits or their duration. However on each occasion notification is required from the investigator to the administration where the person is being held. Investigators often make use of this.

With people held in custody there are also problems with confidentiality of correspondence. According to legislation, all letters, barring those to the Human Rights Ombudsperson, the prosecutor and the European Court of Human Rights, are checked by the administration, and accordingly, censored. This means that letters to a defender are not confidential, this being a clear infringement of the right to defence. There are also frequent cases where letters addressed to the European Court of Human Rights are checked, despite a clear ban on this.

Considerable problems are seen with free legal aid provided in criminal proceedings, which really only exists formally (see below). Legal aid is not given at all in civil cases, this violating Article 6 of the European Convention on Human Rights.

Another problem arises with the examination of cases, especially civil proceedings or on administrative offences, without a defender or in the absence of the person or his/her representative.

A panel of judges of the Supreme Court Criminal Chamber in their Ruling of 27 June 2006 revoked a ruling of the Donetsk Court of Appeal and sent the case for a new examination. From the file of the case it can be see that the criminal proceedings against H., had on his appeal, been examined by the Donetsk Regional Court of Appeal on 5 August 2005. The day before this, H. had addressed an application in writing to the court via the court office. In this letter he had asked for the examination of his appeal to be postponed due to illness, since he insisted on being present during the hearing. However the Court of Appeal did not take heed of this and examined the appeal in his absence, thus violating his right to defence, namely the right set down in Article 358 of the Criminal Procedure Code for a person convicted of a crime to take part in the appeal proceedings.

2) Lack of equality of arms and the limited rights of the defender

This problem is vividly seen in the criminal process and when examining cases involving administrative offences where the principles of adversarial procedure and equality of arms remain mere words. It is impossible to ensure adversarial procedure with the limited rights to defence which Ukrainian legislation recognizes. Here we have in mind the procedure for allowing a defence lawyer to defend the individual, with this exclusively at the consent of the investigator; the seriously limited rights of the defender to independently gather evidence of the person's innocence (at the pre-trial investigation stage only the prosecution has the right to order a forensic examination, interrogate witnesses, request evidence, etc).

The defender also experiences certain difficulties in getting to see the case materials where cases involving administrative offences are being examined. The protocol on the administrative offence is available, but not with any other material (for example, the conclusions of a forensic examination, etc), since this right is not stipulated in legislation.

6. THE SYSTEM OF LEGAL AID

One of the most widespread systemic problems in the human rights sphere is violation of the right to defence and the failure to provide qualified legal aid. At the present time there is no standard government policy for ensuring that individuals receive free legal aid.

The situation with free legal aid in Ukraine is unsatisfactory and not in keeping with basic European requirements for safeguarding the individual's access to justice.

Ukraine's legislation contains a number of separate provisions regulating free legal aid, yet no system ensuring real access to such assistance has yet been created. For example, legislation names

many groups in society entitled to free legal aid, yet up till now State funding has only been allocated to pay for legal aid in criminal proceedings in cases defined by the Criminal Procedure Code.

The procedure for appointing a defence lawyer (defender) via lawyers' associations as set down in the Criminal Procedure Code was introduced under different historical circumstances and it therefore fails to take into consideration present forms and conditions for the functioning of the profession and does not ensure high-quality and timely legal aid.

For the groups in society stipulated in other legislative acts there is no provision for providing free legal aid, nor is the procedure for receiving this defined.

The legally stipulated size of the payment to lawyers appointed to provide legal aid in criminal cases amounts to 15 UAH for a full working day. This kind of payment for ones work, together with the complicated procedure for confirming the lawyer's participation in this category of cases, do not encourage lawyers' systematic and proactive participation, nor ensure a proper level for the legal aid provided at the State's expense.

In 2006 State-funded legal aid was provided for 1,591 criminal cases. The spending on this came to 1,637 thousand UAH (against 2,337 thousand UAH in 1,827 criminal cases during 2005). The Budget Programme «Provision of State-funded legal aid in criminal cases» allowed for spending of 1,960.9 thousand UAH.[19] This means that even with the basic lack of effective legal aid, the State spending allocated for this is not fully utilized.

Legislation only empowers the Ministry of Justice to pay for appointed lawyers in criminal cases. Yet no monitoring of what kind of free legal aid people actually need is carried out, and the budgetary funding is assigned on the basis of outdated indicators.

The International Renaissance Foundation (hereafter IRF), in cooperation with the Ministry of Justice, the Legal Initiative of the Open Society Institute (Budapest) and the Charitable Organization «The Viktor Pinchuk Fund – Social Initiative», the Union of Ukrainian Bar Lawyers, the Ukrainian Association of Lawyers and other partners, began comprehensive measures last year, as part of the charitable programme «Free legal aid», aimed at creating a system of free legal aid in Ukraine.[20]

On 24 January the Ministry of Justice issued Order No. 58/7 «On measures to reform free legal aid» which created and approved Regulations on a Council coordinating reform to the system of free legal aid.

With the expert support of the IRF, this Council under the auspices of the Ministry of Justice drew up a Strategy Plan for creating a free legal aid system. This was approved by the National Commission for the Strengthening of Democracy and the Rule of Law, and on 9 June 2006 signed into law by Presidential Decree № 509/2006.[21]

«The Strategy Plan for creating a free legal aid system in Ukraine is aimed at ensuring the human right to have access to justice in accordance with the Constitution of Ukraine, the Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.

It establishes fundamental principles for the creation and running of a system of free legal aid. It specifically:

- establishes the criteria for access to such free legal aid;
- creates conditions for representatives of the legal profession to volunteer their services;
- offers new approaches to creating budgetary provision for the system;
- defines the principles for managing the system.

The Strategy Plan envisages phased implementation of the measures.

On 19 September 2006 within the framework of the above-mentioned Strategy Plan, a pilot project was launched to provide free legal aid in criminal cases in Kharkiv, based at the Kominternsky District Police Station in the Kharkiv Region.

[19] «In 2006 defence lawyers' services were provided by the State in more than 1,500 criminal cases» //: http://www.minjust.gov.ua/0/8637. (in Ukrainian)

[20] The Charitable programme «Free legal aid» is financed by the Viktor Pinchuk Fund – Social Initiative» and the International Renaissance Foundation.

[21] The Strategy Plan is available (in Ukrainian) at: http://www.prezident.gov.ua/documents/4549.html.

The agreement reached with the Kharkiv Regional Department of the Ministry of Internal Affairs envisages additional guarantees for people detained, including:

access to a lawyer from the pilot project before the detainee is interrogated by a police officer;

the possibility of rejecting the services of a lawyer only in the presence of a lawyer;

reports to the project's lawyers of all cases where people have been detained.

The Kominternsky District Police Station has not always fully kept to the terms of the Agreement, however during later meetings, the Head of the MIA's Central Department for the Kharkiv region and other high-ranking officials of the Central Department affirmed police readiness to cooperate under the conditions of the Agreement.

Five defence lawyers and one lawyer are involved in the pilot scheme at present. They can provide swift and qualified legal aid to people detained at any time of the day or night. This is fully in keeping with the requirements of Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with regard to the right to liberty and security, specifically the right to defence.

On 3 February 2007 the same project was undertaken in the city of Bila Tserkva in the Kyiv region. The Cooperation Agreement providing the same kinds of guarantees for people detained was signed with the Kyiv Regional Central Department of the MIA.

A third pilot project is planned for the Khmelnytsky region.

In addition, with the support of the International Renaissance Foundation, a study is being carried out into the present situation with free legal aid in the Kharkiv region, and an analogous study will soon begin in the Kyiv region. They will give actual data about the level of provision of such aid in cases where legislation requires that aid be granted and make it possible to compare this with data gathered after the start of the pilot project.

7. REASONABLE TIME LIMITS IN THE JUDICIAL PROCESS

Due to shortcomings in judicial procedure, as well as the not always warranted extended jurisdiction of the courts, for example, in examining administrative offences, judges are unable to give timely and high-quality consideration of cases.

Courts quite often return claims lodged without grounds, while judges procrastinate with investigating cases and hand down rulings outside what can be called a reasonable time frame.

No clear mechanism has been drawn up for establishing the court's liability for procrastination with examining cases, as well as judges' liability for not carrying out their duties in a qualified manner.

There is an irrational method for allocating judges to courts which leads to some having an excessive workload, while others don't have enough to do.

The time limits set down in procedural legislation are virtually never kept. For example, 67.6 thousand cases and applications, or 10% of the total, were examined with infringements of the time frame established by the Civil Procedure Code. At the end of June 2006 almost 217 thousand civil cases based on civil suits or applications from the prosecutor had not been examined, this being 26.1% of all cases which were scheduled for review during the first half of 2006. 24% of those cases had been awaiting examination for more than 3 months.

Ukrainian legislation basically fails to provide for the right of parties to legal proceedings to appeal against the excessive duration of proceedings. Nor does it guarantee the right to compensation of damages incurred as a result of unwarranted delay in hearing a case in court. There have however been attempts by the Ministry of Justice to draw up such a draft law.

Understanding this problem, the Supreme Court of Ukraine sent the Chairpersons of appellate courts Letter No. 1-5445 from 25.01.2006 concerning adherence to reasonable time spans when considering cases. The letter analyzed the reasons why cases are dragged out on the basis of those cases which have been considered by the European Court of Human Rights. The letters gives the following main problems:

- the repeated return of a case for additional investigation;

♦ the scheduling of court hearings with considerable time gaps which is unacceptable when examining criminal cases, even where the defendant has not been remanded in custody;

♦ the failure of one of the parties to appear at a court hearing, with the judge not ordering that the person be brought to the court forcibly, where the case cannot be considered in the person's absence.

In the case of Antonenkov and others v. Ukraine[22] criminal proceedings had been launched against three applicants on 26 June 1996 and the case submitted to the court on 3 March 1997. The case was heard in the Shevchenkivsky District Court in Kyiv from 2 April 1997 to 17-19 July 2002. It was twice, on 22 June 1998 and 20 April 2000, on identical grounds, sent back for additional examination. On 17 July 2002 the Court disjoined the proceedings concerning the charges of theft and embezzlement and remitted the case in this part for additional investigation. On 19 July 2002 the District Court terminated proceedings concerning some of the other charges as time-barred.

CASE OF SILINY V. UKRAINE[23]

In September 1997 the title to reside in the State–owned flat, where the Siliny brothers' father had resided before his death on 29 December 1996 was transferred to Mr S. On 2 December 1997 the Siliny brothers instituted civil proceedings in the Leninsky District Court of Zaporizhzhya («the Leninsky Court») against the Zaporizhstal Joint Stock Company, the Zaporizhzhya City State Administration, and Mr S. They claimed their right to live in the impugned flat.

Out of twenty hearings held between December 1997 and October 2000 fourteen were adjourned due to the absence or at the request of Mr S. or the representative of the Zaporizhstal Company. The hearing of 11 December 1998 was adjourned until 29 January 1999 at the applicants' request.

On 5 October 2000 the court found for the applicants, however on 21 November 2000 the Zaporizhzhya Regional Court, upon the appeal in cassation of the Zaporizhstal Company, quashed the decision of the first instance court and remitted the case for a fresh consideration. On 6 February 2002 the court, sitting as a panel of three judges, found against the applicants. On 18 April 2002 and 21 February 2003, respectively, the Zaporizhzhya Regional Court of Appeal and the panel of three judges of the Supreme Court of Ukraine rejected the applicants' appeals and upheld the judgment of 6 February 2002.

The Siliny brothers complained that the length of the proceedings had been incompatible with the «reasonable time» requirement, provided in Article 6 § 1 of the Convention.

The Court observes that the impugned proceedings began in December 1997 and were completed in February 2003. Their overall duration was around five years and three months

It reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute.

The Court conclude that the subject matter of the litigation at issue could not be considered particularly complex. It also finds that, while there were some periods of delay which could be attributed to the applicants, there was no evidence before the Court to suggest that the applicants contributed significantly to the overall length of the proceedings.

The Court recalls that it is the role of the domestic courts to manage their proceedings so that they are expeditious and effective. In particular, the domestic courts were in a position to judge whether there were valid grounds for the adjournment of the proceedings at the request of any of the parties and, if so, to establish the period of such adjournment. Moreover, the courts enjoyed full competence under Ukrainian law to apply administrative and criminal law sanctions against the parties whose behaviour caused unjustified delays in the proceedings Therefore, the Court

[22] Judgment of the European Court of Human Rights from 22 November 2005 in the Case of Antonenkov and others v. Ukraine (№ 14183/02).
[23] Judgment of the European Court of Human Rights from 13 July 2006 (№ 23926/02).

considers that the State authorities were responsible for the protraction of the proceedings before the first instance court for a total of around fifteen months, which took place between December 1997 and October 2000.

The Court notes that the proceedings before the courts of appeal and cassation were completed within one year. Nonetheless, having regard to the delays before the first instance court and to the circumstances of the instant case as a whole, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the «reasonable time» requirement.

There has accordingly been a breach of Article 6 § 1 of the Convention

8. ENFORCEMENT OF COURT RULINGS

The present system for enforcing court rulings is not efficient and there is effectively no system of control over the work of the State Bailiffs' Service. The European Court of Human Rights in judgments passed down against Ukraine most often finds that there has been a violation of the right to a fair trial especially due to the non-enforcement of rulings from domestic courts within a reasonable period of time.

In 2006 the State Bailiffs' Service [SBS] was supposed to enforce 5 321 378 writs of execution issued on the basis of rulings from courts of all levels, including foreign courts and arbitration tribunals, not counting writs to extract alimony and decisions of other bodies (public officials) to the sum of 44 773 180 942 UAH. The Bailiffs enforced 3 693 486 writs in the given category, or 69.4% of the number actually due for enforcement during the reporting period, for the sum of 21 209 438 364 UAH.[24]

Last year 855 650 writs to retrieve alimony were due to be enforced on the basis of rulings from general or foreign courts. Of these 224 844 were enforced, this being 26.3% of the total. This means that almost 74% of such writs are not enforced. The problem of enforcement of court rulings regarding alimony was expressed in the Letters from the State Bailiffs' Service № 25-4/458/ from 13.07.2006 and № 25/7-33-4272 from 09.06.2006 which provide directives on correct application of the relevant legislation.

During 2006 the State Bailiffs' Service dealt with possessions to be sold with a total value of 583 494 468 UAH. As of 1 January 2007 possessions worth 158 489 575 remained. Of this figure, sale of property worth 32 394 145 UAH had been stopped.

The highest percentage of sales by the State Bailiffs' Service of seized possessions was in the Department for the forced enforcement of rulings of the State Bailiffs' Service (100%), as well as in the Kharkiv (61%), Volyn (55,7%) and Vinnytsa (55,8%) regions. The worst was in the State Bailiffs' Service of the Autonomous Republic of the Crimea (15,3%), the Transcarpathian (12,8%) and Ivano-Frankivsk (12,2%) regions.

Of the overall amount remaining under 8 categories of writs, execution was halted on 165 941 documents (6.5% of those remaining) worth 6 940 353 724 UAH. (65% of the remainder of money not extracted). This is 1 897 writs less, and 3 392 546 997 UAH more than in 2005. Of these figures:

– On the basis of item 8 of Article 34 § 1 of the Law on Bailiff proceedings, in connection with the court's having initiated proceedings in a case involving the bankruptcy of the debtor, execution was stopped on 62 364 writs (37,6%) to the value of 8 024 978 569 UAH, or 47,4% of the value of the halted proceedings;

– On the basis of item 6 of Article 34 § 1 of the Law on Bailiff proceedings, in connection with the halting of execution by a public official who is empowered to take such a decision, on 18 863 writs (11,4%) amounting to 1 564 206 544 UAH or 9,2%;

– On the basis of item 13 of Article 34 § 1 of the Law on Bailiff proceedings, in connection with the court having granted a deferment, 3 816 writs (2,3%) to the sum of 620 430 683 UAH. (3,7%) were halted;

[24] Here and later the information is provided by the Ministry of Justice http://www.minjust.gov.ua/0/news/8989

– On the basis of item 5 of Article 35 of the Law on Bailiff proceedings, in connection with an appeal lodged with the court against the actions of a state functionary or a refusal to have the person removed from the proceedings, 1 667 writs (1,0%) amounting to 1 004 706 512 UAH, or 5,9% were halted.

In connection with the Law «On imposing a moratorium on the forced sale of possessions», execution was made more difficult on 97 334 writs, this being 3.8% of the total number of remaining writs, amounting to 8 682 809 587 UAH (33.3%).

With a breakdown into regions, the worst findings for the work of the State Bailiffs' Service are as follows:

By number of executed writs, figures which are lower than the average for Ukraine (64.4%) were seen in Sevastopol (45,7%) and the Ternopil (54,4%), Transcarpathian (56,1%) and Poltava (56,2%) regions.

In terms of amounts according to completed writ executions, figures lower than the average for Ukraine (47,9%) were found in the Donetsk (29,8%), Ivano-Frankivsk (37,2%), and Rivne (39,3%) regions, and in Sevastopol (30,9%)

In terms of number of actually executed writs lower than the average for Ukraine (33,7%) the figures were worst in the Sumy region (26%) and Zhytomyr region (27,4%), as well as in Sevastopol (22,5%).

In terms of amounts according to completed writ executions in connection with the effectively full enforcement, figures lower than the average for Ukraine (10,9%) were seen in the Sumy region (7.4%) and Ivano-Frankivsk region (7.1%), as well as in Sevastopol (5.2%)[25]

In 2006 the prosecutor's office uncovered significant infringements by bodies of the State Bailiffs' Service of current legislation when enforcing court rulings on State seizure of funds. There have been cases of inaction or abuse of their position by officers of the Service.

Last year the Sector for internal control over the State Bailiffs' Service carried out 15 checks into the work of territorial offices of the SBS, resulting in disciplinary proceedings being launched against 11 people.

At the end of 2006 63 protocols on administrative offences had been issued against officers of the State Bailiffs' Service. Of these, 39 protocols were cancelled due to the lack of elements of an offence, in 20 cases methods of influence had been applied in the form of fines and warnings; in one case the time period had been missed for initiating proceedings; one was remitted for shortcomings to be eliminated; one was not reviewed by the court and one file is presently being examined in court.

Over the years in which the judiciary has been developing and forming, the State Bailiffs' Service has also undergone reforms on several occasions. In 2006 the Service experienced the latest reform, with this last «experiment» being the adoption on 22 December 2006 by the Verkhovna Rada of the Law «On amendments to the Law of Ukraine «On the State Bailiffs' Service» and «On Bailiffs' proceedings», with regard to reform of the offices of the State Bailiffs' Service». The main idea is to return the State Bailiffs' Service into the structure of the Ministry of Justice. We would note that until this, the State Bailiffs' Service had special status as a governmental body of State governance within the Ministry of Justice, and this level of «autonomy» was fully in line with the Recommendations of the Council of Europe. However it had this status for too short a period of time to determine how effective its work was. Despite this, the decision was taken to return to the situation which existed before the reform, this effectively meaning the reinstatement of a so-called «dual subordination» of regional and territorial offices of the SBS to both the Department of the State Bailiffs' Service, and to territorial departments of justice. This dual subordination also means dual control over the activities of the State Bailiffs' Service's offices, which does not contribute favourably to the clear work of this Service.

Unfortunately, in general reform of the State Bailiffs' Service in Ukraine has been prompted by political motives, the need to increase control over the activities of the Service, turning it into an instrument to exert influence in a political struggle.

[25] «On the results of the work of the Ministry and its territorial bodies in 2006 and the task of increasing its efficiency in 2007» p. 34 (in Ukrainian)

Against this struggle for control, other issues remain unresolved, relating to staffing problems, increasing legal and social protection for State bailiffs, improving legislative norms which directly regulate the procedure for enforcing rulings. The legal status of State bailiffs needs considerable reworking since they are given certain powers to carry out coercive measures when enforcing rulings, for example, seizing and removing property, forced entry into a person's home or other possessions, imposing fines on people in debt, initiating criminal proceedings against a debtor. When applying these measures, resistance is possible, the use of threats, violence or other unlawful activities by the debtor against the bailiff. However, unlike law enforcement officers or judges, State bailiffs are virtually not protected by current legislation against such actions. This remains unresolved despite the fact that an improvement in the legal status of officers of the Bailiffs' Service would lead to increased efficiency of the Service's work.[26]

Given these systemic problems, the President issued Decree № 587/2006 on 27 June 2006 which approved a National Action Plan on ensuring proper enforcement of court rulings. The implementation of this should certainly get the situation moving.

Another problem is enforcement of judgments issued by the European Court of Human Rights. These judgments require action as far as the applicant is concerned (individual measures), and on preventing similar violations in future (general measures). In view of this, a Law was drawn up and passed on 23 February 2006 «On the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights» which considerably improved these procedures. A Cabinet of Ministers Resolution from 31 May 2006 № 784 «On measures to implement the Law of Ukraine «On the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights» with this making the Ministry of Justice responsible for representing Ukraine at the European Court of Human Rights and for enforcing its judgments. It should be noted that the Law took on board all contemporary documents of the Council of Europe aimed at comprehensive resolution of issues regarding enforcement by Member States of European Court judgments.

A positive example of this enforcement can be seen with regard to the case of Salov v. Ukraine. The Ukrainian Supreme Court, in reviewing the case as exceptional proceedings on 26 January 2007 issued a Ruling cancelling the sentences handed down on Salov, and terminating the criminal proceedings due to the lack of elements of a crime, as envisaged in Article 127 of the Criminal Code, in his actions.[27]

9. THE PRESUMPTION OF INNOCENCE

In the present criminal procedure system the principle that a person is presumed innocent unless proven otherwise is often infringed. This is caused both by flawed legislation, and by the lack of respect for this principle demonstrated by public officials, including those who hold the highest posts in the country (the President, the Minister of Internal Affairs, the Prosecutor General and others.)

Nor does legislation guarantee the presumption of innocence in cases involving administrative offences.

The right to not testify against yourself is a part of the presumption of innocence, however cases remain common where a person is first interrogated as a witness, and then the testimony is used against him or her when charges are laid.

The following can also be considered infringements of the presumption of innocence in legislation:

- the practice by the court of returning criminal cases for further investigation;
- the possibility of launching a criminal investigation against a specific person, and not over a specific crime;

[26] What you call the service, that's what it ... // Yurydycheskaya praktyka. – 2007. – 30 January – № 5 (475).

[27] The text of the Supreme Court ruling is available in Ukrainian at: http://khpg.org/index.php?id=1178807944. The following links (in Ukrainian) give information about the course of the Salov case : http://khpg.org/index.php?id=1089483480, http://khpg.org/index.php?id=1116947397, http://khpg.org/index.php?id=1088460459, http://khpg.org/index.php?id=1040150598, http://khpg.org/index.php?id=1009128489

Another aspect of the criminal process was found by the European Court of Human Rights to be a violation of the presumption of innocence. In the case of Panteleyenko v. Ukraine[28], the European Court pointed out that the termination of criminal proceedings on exonerative grounds could constitute an infringement of the presumption of innocence since a person is considered innocent until a court finds the person guilty, yet in this case guilt had been determined before any guilty verdict.

The Court notes that the applicant's case was terminated at the pre-trial stage by the investigative authorities, on the ground that the minor character of the offence committed by the applicant[29] made its prosecution impractical. The domestic courts, having reviewed this decision, agreed that the (unnamed) evidence in the case file was sufficient to conclude that the applicant had committed an offence as well as the minor character of that offence. .... It notes that in the present case the court decisions terminating the criminal proceedings against the applicant were couched in terms which left no doubt as to their view that the applicant had committed the offence with which he was charged.

In particular, the Desniansky Court indicated that the investigation case file contained sufficient evidence to establish that the applicant had forged a notarial document and had wittingly carried out an invalid notarial action, its only reason for discontinuing the proceedings being the impracticality of prosecuting an insignificant offence. This decision was upheld by the Court of Appeal and the Supreme Court rejected the applicant's request for leave to appeal in cassation. In the Court's view, the language employed by the Desniansky Court was in itself sufficient to constitute a breach of the presumption of innocence. The fact that the applicant's compensation claim was rejected on the basis of the findings reached in the criminal proceedings merely exacerbated this situation.

Although the Desniansky Court reached its conclusion after a hearing held in the presence of the applicant, the proceedings before it were not criminal in nature and they lacked a number of key elements normally pertaining to a criminal trial. In that respect, it cannot be concluded that the proceedings before that court resulted, or were intended to result in the applicant being «proved guilty according to law». In these circumstances, the Court considers that the reasons given by the Desniansky Court, as upheld on appeal, combined with the rejection of the applicant's compensation claim on the basis of those same reasons, constituted an infringement of the presumption of innocence.

The European Court thus affirmed that the court first needed to establish the person's guilty, and only then terminate proceedings due to the minor nature of the offence. According to the present Criminal Procedure Code, proceedings can be terminated due to their insignificance even before a court hearing, this meaning before the person has been found guilty.

However, as noted, considerable problems are presented by the lack of a proper level of legal culture among high level public officials. Virtually every press conference given by top officials of the MIA or the Prosecutor General's Office is accompanied by information about a crime uncovered or a criminal identified long before any verdict has been handed down by the courts on these criminal investigations.

The Co-Rapporteurs of the Parliamentary Assembly of the Council of Europe (PACE) have also called on high-ranking public officials to respect the principle of the presumption of innocence.[30]

An additional infringement of this principle is the application of amnesties with respect to people whose criminal investigation is still in process.

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[28] Judgment of the European Court of Human Rights from 29 June 2006 (No. 11901/02)

[29] Since it is difficult to understand out of context which courts are involved, it may be indicative to note how the European Court reported this same detail. In item 12 we read: «On 4 August 2001 the criminal case was closed due to the insignificance of the offence which had been committed.». The Court in the text above (69) which said the crime had been committed by the applicant was the Desniansky Court. (*translator*)

[30] See Item 252 of the Report by Hanne Severinsen and Renate Wohlwend Honouring of obligations and commitments by Ukraine // PACE Document from 5 October 2005, № 19676.

10. CORRUPTION OF THE JUDICIARY

President Yushchenko speaking before the opening of the first session of the newly-elected Verkhovna Rada on 25 May 2006 said that in his view the deep-set corruption of the courts was a critical and profound threat to Ukraine's national security. In response, the Council of Judges on 26 May issued a public statement in which it rejected cursory assessments and stated that such speeches undermined the independence and authority of the justice system.[31]

We present all the cases known to UHHRU where judges have faced criminal charges.

In April 2006 the former Chairperson of the Kolomyysky City-District Court of the Ivano-Frankivsk region V. Manulyak was sentenced to three years imprisonment with confiscation of his property, stripped of his qualification level and banned from occupying the position of judge. In August 2005 on the basis of material from SBU [the Security Service], the Prosecutor General had initiated criminal proceedings over the judge being accused of demanding a bribe. Manulyak had demanded one thousand dollars for reclassifying the actions of the accused under another article of the Criminal Code which envisaged a much lighter sentence and which would enable the person to be released under amnesty. The judge was arrested at the place of the crime after the bribe had been handed over.

In June 2006 the Lviv Regional Appeal Court sentenced a judge of the Ivano-Frankivsk City Court to 18 months imprisonment. He was accused of involvement in a criminal gang which imported expensive foreign cars to Ukraine without paying the required duty, registering them with the MIA and then selling them. He had knowingly allowed false administrative cases. For material remuneration the judge had passed knowingly unlawful decisions according to which the cars of supposed offenders had been confiscated in favour of the State and passed to the members of the organized gang. Moreover, the individuals against whom his rulings were issued, had never owned the vehicles and were not at all aware of the court rulings issued. The latter were however the means of legalizing the cars.

A judge of the Velykolepetynsky District Court of the Kherson region was convicted of abuse of power and his official position leading to serious consequences. He was given a three year suspended sentence and banned from holding any office connected with court work.

In 2006 a judge of the Zaporizhya District Court of the Zaporizhya region O. Yevseyev was convicted of bribe-taking on a particularly large scale and sentenced to four years imprisonment with confiscation of his property, and a ban on occupying the position of judge.

In March 2007 parliament gave its consent for the arrest of Oleh Pampura, judge of the Arbuzynsk District Court in the Mykolaiv region. In March 2006 a criminal investigation was launched against the judge on suspicion of the crime «bribe-taking by a civil servant». In connection with the accusations, the President had removed O. Pampura from his post pursuant to Article 147 of the Criminal Procedure Code while the judge himself was on the police wanted list.

The President through Decrees:

– № 480/2006 from 3 June 2006 dismissed V. Kapichak from his post as Chair of the Drohobych City-District Court of the Lviv region over criminal charges having been brought against him;

– № 1124/2006 from 25 December 2006 dismissed L. Novovska from her post as Chair of the Khartsyzk City Court of the Donetsk region over criminal charges having been brought against her.

Yet the MIA and SBU reported a much greater number of cases of corruption among judges. These cases however slipped from view. Here, for example, is a typical report which so far has not resulted in anything:

«The Lviv Regional Prosecutor's office has launched a criminal investigation against the Deputy Chairperson of one of the local courts of the Lviv region over elements of the crime set out in Article 368 § 2 of the Criminal Code, being implicated in demanding and receiving a bribe for issuing knowingly unlawful rulings in court cases».

In July 2006 an analytical report was published on the results of the study «Corruption and the provision of services in the Ukrainian judiciary»[32].

[31] Statement from the Council of Judges of Ukraine on 26 May 2006 // Holos Ukrainy [Voice of Ukraine] № 102, 6 June 2006.

[32] «Corruption and the provision of services in the Ukrainian judiciary» was financed by the Council of Europe under the auspices of the Delegation of the European Commission to Ukraine and supported by the UN Development

According to the report, the courts are in fourth place among State institutions, after the State Automobile Inspection, the police and customs. Most respondents believe that corruption is widespread in these bodies.

The same view is held by people who have had direct experience of approaching the court. 43.6% of respondents consider that corruption is prevalent among officials in the court, with almost one quarter (23%) believing that corruption is present at a 50/50 level, while 22% did not know how to answer. Only 11.4% believe that corruption is not widespread among officials in the court.

Those respondents who had used the services of intermediaries, including legal ones or lawyers (45.3% had) in the court, were asked about handing over unofficial payments to officials of the court via such intermediaries. One fifth 20.7% (or 9.3% of all respondents) considered that the expenses paid intermediaries included unofficial payments to officials of the court. More than half of them (58.2%) excluded the possibility of such unofficial payments, while 21.1% were either unable or unwilling to answer this question.

64.7% of the lawyers surveyed believe that to some degree or other corruption is prevalent in the judiciary, while only 6.1% were able to assert that corruption is «not at all widespread».

The average percentage of unofficial payments to officials of the court came to 48.4% of the amount paid to intermediaries.

If one bears in mind the percentage (21.1%) who couldn't decide how to answer the question about handing over unofficial payments via intermediaries, and if we also assume that those who don't have an intermediary, may also give bribes, then one can with certainty assume that no less than 20% of the people who have approached the courts have given bribes (20.6% of all Ukrainian citizens gave money or presents to officials during the last year).

The most corrupt (the biggest bribe-takers) among officials of the judiciary were seen as being judges (19.5%). In second place in terms of bribe-taking were criminal investigators – 10.6% consider them to be corrupt, followed by defence lawyers (9,2%). 8.5% of the respondents consider all officials of the judiciary to be corrupt, while 5.5% do not regard any officials in the judiciary to be corrupt. 7.9% see the prosecutor's office as corrupt, and 5.4% – chairpersons of courts.

According to assessments given by lawyers of the level of corruption in branches of the judiciary, the least corruption was identified in administrative proceedings (33.5% of those surveyed saw this level as lower than average), while criminal and civil court proceedings were considered to some extent more corrupt. The most corrupt branch was deemed to be the work of the economic courts (38.7% of respondents classified corruption there as «probably widespread», or «extremely widespread»).

More than half of the lawyers (52%) named the main reason for corruption in the judiciary as being the low pay of civil servants. The next most important reason was considered to be «inadequacies in legislation» ((34%), and the third cause, lawyers believed, was the effectively impunity for corrupt activities (30.2%).

11. RECOMMENDATIONS

1. Continue implementing the Strategy Plan for improving the justice system to ensure fair trial in Ukraine in accordance with European standards passed by Presidential Decree. In particular, within a year pass the Laws on the Judiciary and on the Status of Judges submitted by the President to the Verkhovna Rada in December 2006.

2. Continue implementation of the Strategy Plan for reforming the system of free legal aid

Programme in Ukraine. The study was carried out by the Kyiv International Institute of Sociology in cooperation with the Ukrainian Ministry of Justice from 17 February – 22 May 2006. It was aimed at finding out the views both of the general public and of lawyers with experience of court proceedings with regard to corruption and the provision services in the justice system, with a specific focus on the court system. The study was based on three surveys of the public (1,028 respondents) and a survey of lawyers (966 respondents).

3. Continue drawing up a Strategy for reforming criminal justice and begin implementing its provisions, in particular, by reforming criminal procedure law and passing a new Criminal Procedure Code33.

4. High-ranking public officials should avoid direct accusations against any individuals of having committed different crimes since such accusation place in jeopardy the person's right to the presumption of innocence. Such accusations may only be made after a court verdict has come into legal force.

5. Increase the efficiency of the State Bailiffs' Service by strengthening legal and social protection of State bailiffs, as well as other guarantees of their independence, and by improving the legislative norms which directly regulate the enforcement of court rulings.

6. Implement the National Action Plan on ensuring proper enforcement of court rulings passed by Presidential Decree № 587/2006 on 27 June 2006.

7. The place of the State Bailiffs' Service needs to be clearly defined within the system of State bodies. Individuals applying for jobs connected with enforcing court rulings much take a qualifying test and have a probationary period. It would be expedient to gradually remove the monopoly of State activity in enforcing court rulings and envisage the possibility of transferring it to non-State enforcers or enforcement agencies under the efficient control of the Ministry of Justice.

8. Raise the liability of debtors for non-enforcement of court rulings or for deliberately creating conditions which make enforcement impossible, as well as introducing incentives for voluntary enforcement of a court ruling.

[33] It should be noted that what is involved here is not the draft Criminal Procedure Code which has been under review in parliament for years, since it does not establish internationally accepted procedure for observing people's rights and liberties during the criminal process. This is a draft Code being drawn up by a working group of the National Commission for the Strengthening of Democracy and the Rule of Law.

V. THE RIGHT TO PRIVACY[1]

The right to privacy is largely guaranteed by the Constitution of Ukraine. Article 30, for example, guarantees territorial privacy (inviolability of dwelling place), while Article 31 concentrates on privacy of communications (privacy of mail, telephone conversations, telegraph and other correspondence) and Article 32 – on privacy of information. («No one shall be subject to interference in his or her personal and family life, except in cases envisaged by the Constitution of Ukraine. The collection, storage, use and dissemination of confidential information about a person without his or her consent shall not be permitted ...»). In addition, Article 28 guarantees certain aspects of physical privacy («No person shall be subjected to medical, scientific or other experiments without his or her free consent.»)

Constitutional norms providing an exhaustive list of grounds for intrusion into privacy and the conditions which must be met have not been sufficiently developed in laws and subordinate legislation. The rather unclear formulation, or indeed lack of regularization of permissible grounds for restricting the right to privacy, the scope and methods used remain the least resolved issues in legislative regulation of privacy with this leading in practice to countless violations.

Liability for infringements of the right to privacy is set down in criminal, civil and administrative legislation, yet the lack of clarity in this area makes such norms practically impossible to apply.

The situation is generally deteriorating especially as regards confidentiality of communications and information.

1. COMMUNICATIONS PRIVACY

Current legislation does not stipulate either any clear grounds for interception of information from communication channels (phone tapping, mobile tapping, Internet tapping or e-mail tracking), or the specific period when such information is intercepted, or the circumstances in which the information should be destroyed and how it can be used. There are clearly not enough guarantees of the lawfulness of interception of information from communication channels. Consequently, no one can control the number of permits and the necessity for listening-in, and the individuals, in relation to whom such measures have been applied, are not aware of this fact and can, therefore, neither challenge such actions in court nor otherwise defend their right to privacy.[2]

In March 2006 representatives of the electoral bloc «Nasha Ukraina» [«Our Ukraine»] Roman Zvarych, Roman Bessmertny and Petro Poroshenko, as well as the Minister of Internal Affairs Yury Lutsenko publicly stated that the former Head of the Security Service [SBU] Oleksandr Turchynov had used his official position to monitor telephone conversations involving public officials from different State authorities. According to Roman Bessmertny, transcripts of his telephone conversations had been circulated. In addition, international calls had been tapped. Oleksandr Turchynov denied having authorized any wiretapping of politicians and public officials from the highest State bodies.

[1] Prepared by Volodymyr Yavorsky, UHHRU.

[2] Human Rights in Ukraine – 2004. – Kharkiv: Folio, 2006 (see the section on Privacy) http://khpg.org/en/index.php?id=1160759402

However the SBU publicly confirmed that there had been unlawful wiretapping, and the Prosecutor General launched a criminal investigation into this.

While reporting on the work of the Security Service during the first 9 months of 2006, the Head of the SBU stated that 10 cases of unlawful wiretapping had been uncovered, these having been carried out by State bodies or commercial outfits[3]

On 19 December, following a special operation in Kyiv, the SBU put a stop to the illegal activities of a commercial firm which had been carrying out unlawful wiretapping of members of the public and, it cannot be excluded, certain high-ranking public officials. A special device for tracking, tapping and recording conversations via the GSM cellular network was confiscated from an employee of the firm. According to specialists, the device was the most complex of its kind with a market value of nearly 420 thousand US dollars depending on its features. Security Service officers are looking into how it was brought here and where from.[4]

On 5 February 2007 the Deputy Prosecutor General V. Pshonka initiated a criminal investigation into a breach of privacy over a telephone conversation between Speaker of the Verkhovna Rada O. Moroz and the United Kingdom Ambassador, a run down of which had been published in January 2007 on the Internet. The Kyiv prosecutor has been made responsible for the pre-trial investigation into this criminal matter. The SBU was accused of the wiretapping which it was claimed had been commissioned by Ukraine's President. The SBU categorically denied such charges, referring to information from an internal examination.[5]

It should be noted that in NOT ONE of these cases were those responsible punished, or at least the public have not been informed of any such cases. This demonstrates inadequate protection of privacy.

The press reported only one such case, although in fact it is difficult to gauge the scale of this. In May the Holosiyivsky District Court in Kyiv convicted a person from Kyiv detained by SBU officers for illegally making, installing and using a technical device for tacit unlawful wiretapping. The actual device had been removed by offices of the SBU Counter-espionage Department in October 2005. It was later established that the micro-transmitter installed in the firm had been ordered by business competitors. The Holosiyivsky District Court fined Oleksandr H. under Article 182 of the Criminal Code.[6]

On 11 September 2006 it was learned that the Prosecutor General had carried out a check of both the SBU and the Foreign Intelligence Service [SZRU, from the Ukrainian] for possible unsanctioned wiretapping of National Deputies and high-ranking officials. The check was carried out at the request of National Deputy Volodymyr Sivkovych who had stated that he was able to produce more than 100 hours of telephone conversations taped by the Security Services. The SBU categorically denied any involvement in intercepting politicians' phone calls. The check did not find any evidence of the two Services having carried out such wiretapping[7]

Exact figures for the extent of wiretapping carried out in Ukraine are not available as official statistics are not provided by the authorities. However it did become known that in 2002 the courts had issued over 40,000 warrants for wiretapping. It was also officially confirmed that in 2003 the Appeal Court of the smallest region in Ukraine, the Chernivtsi region, had issued 823 warrants for the interception of information from communications channels.[8]. According to information from the Prosecutor General's Office, the number of such warrants by September 2005 was in excess of 11 thousand, with the results of the wiretapping having been used in only 40 cases.[9] Following wide publicity over these facts, the SBU included such information in the «List of Items of information

[3] SBU Press Centre information for the press from 2 October 2006, it is available on the SBU website (in Ukrainian): www.sbu.gov.ua.
[4] SBU Press Centre report from 20 December 2006: www.sbu.gov.ua.
[5] SBU carries out searches of its subdivisions // UNIAN news agency: www.unian.net
[6] SBU Press Centre report from 24 May 2006: www.sbu.gov.ua.
[7] The Prosecutor General has checked out whether the Security Service wiretapped politicians // http://ua.proua.com/news/2006/09/12/121530.html
[8] Yevhen Zakharov: «Investigative activities and privacy of means of communication», available in English at: www.khpg.org.ua
[9] Prava Ludyny [Human Rights], No. 28, 1-15 October 2005

which constitute State secrets» [LIISS][10]. The Security Service thus, instead of protecting people's rights, simply classified as secret information about infringements of their rights. .

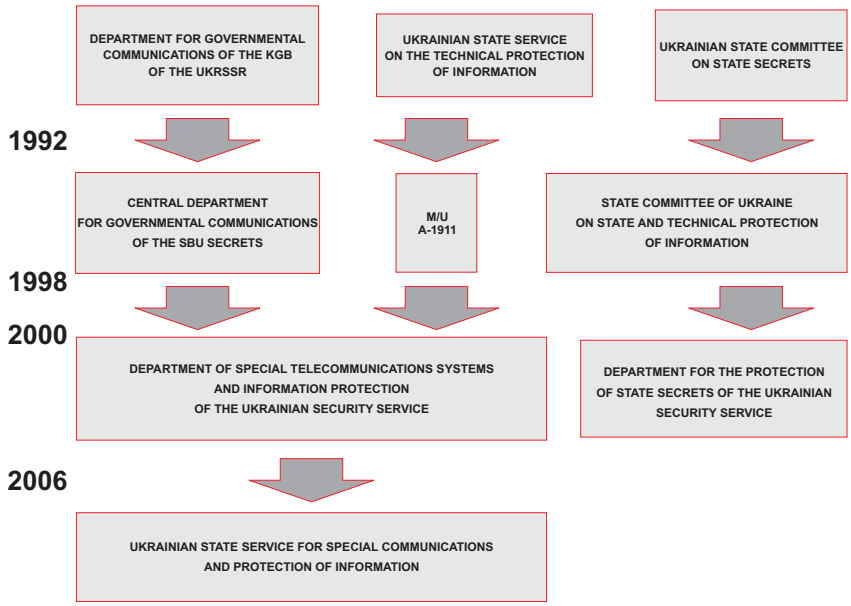
In an interview given on 7 November 2006, the Head of the SBU stated: *«At present the number of technical operations has approximately halved since last year, while the effectiveness of using the material as evidence in court has remained the same, or has even increased. We are thus paying attention to the quality, not the amount of such work. And I think that that is significant progress».»*[11] It follows from this that around 20 thousand interception warrants are issued per year which is 10 times more than in other democratic countries, where this information is made public in annual reports, and not classified as a State secret.

On 7 November 2005 President Yushchenko passed Decree № 1556/2005 «On observance of human rights in carrying out investigative operational and technical measures», however he continues to rely on institutional changes in the law enforcement agencies, and not on the establishment of procedural guarantees against abuses. Such measures appear superficial. The transfer of wire tapping of citizens to one body, in this case the SBU will not resolve the problem. In our opinion, none of the measures outlined in the Decree will improve the situation since they fail to take into account both the positive experience gained by other countries, and the standards set by the European Court of Human Rights.

The President's Decree speaks of the need to create a single State body entitled to intercept information from communication channels, this being a State Service for Special Communications and Protection of Information as a central authority with special status. Its key functions would be to implement State policy on protecting State-owned information resources in networks for transmitting data, to safeguard the functioning of the State system of governmental communications, a National system for confidential communications, cryptographic and technical protection of information.

One positive aspect can be noted in the fact that this Service is to be formally fully separate from the SBU, although it is effectively made up of its former employees.

History of the creation of the State Service for Special Communications



[10] New Item 4.4.8 of the «List of Items of information which constitute state secrets» (the amendments were passed by SBU Order № 440 from 12.08.2005), classifies statistical information about investigative operations.

[11] Interview given by the Head of the Security Service of Ukraine Ihor Drizhchany on Oleksandr Kolodiy's programme «First-hand details» on the television channel «Inter» on 7 November 2006. Available in Ukrainian on the SBU website www.sbu.gov.ua.

The first task after the creation of such a single State body was to transfer under its control all equipment for intercepting communications held by law enforcement agencies. Here an interesting situation emerged. It transpired that the latter were unable to account for the number of packs for intercepting communications they had. The SBU asked several times for all equipment to be handed over to the newly-created Service which now has the exclusive right to intercept communications in Ukraine.

«...When we began trying to establish what special packs they had for wiretapping, including mobiles, and for finding out where the owner of the mobile was at any point in time, it turned out that the Ministry of Internal Affairs (MIA) had only used money from Budgetary allocations to buy 9 such packs, and yet 17 were handed over to the Ukrainian Security Service. That suggests that some other sources of financing may have been used to buy special technology. The possibility follows also that there was unsanctioned purchase and use of such devices, including with the aim of serving he interests of particular political forces or commercial structures. We are carrying out an internal investigation into this. According to operational information, 8 of these systems simply vanished prior to the change in management of the MIA. Where are they now? Which of us, esteemed citizens, is having our conversations tapped? Who is under surveillance? Unfortunately I didn't inherit this information», the Minister of the MIA told parliament at the beginning of 2007.[12]

On 26 November 2006 Parliament passed in its first reading the Draft Law «On amendments to some legislative acts of Ukraine on preventing interception of information from telecommunication channels»[13]. In March 2007 the draft law was ready for its second reading. Despite certain positive aspects, the given draft does not change the situation to any significant extent, since it does not establish any of the additional safeguards against abuse, recognized by international law, for example, the judgments of the European Court of Human Rights. The draft only broadens the limits of criminal liability for infringing confidentiality of correspondence.

In order to counter so-called «computer terrorism», the SBU is carrying out measures aimed at monitoring the use of the Internet and regulating the Ukrainian segment of the network. Despite the lack of legally established powers of the SBU in this sphere, the latter is continuing to introduce technical possibilities for monitoring the use of the Internet.

In accordance with Order No. 122 of the State Committee on Communications from 17 June 2002, only Internet providers which have installed a state system of monitoring (analogous to the Russia SORM – «System of ensuring investigative activity») and have received the appropriate certificate from the SBU may provide access to global information networks to institutions and organizations which receive, process, circulate and store information which is the property of the state. Internet providers were particularly critical of the demand of the SBU that such equipment be installed at the providers' expense. It is impossible to separate the traffic of state and non-state users of their services and protect the latter from monitoring. In this way all clients of companies which agreed to install the equipment would automatically be exposed to permanent monitoring by the SBU.

The change of leadership in Ukraine did not bring any change in this area. The SBU in 2005 sent letters to state institutions instructing them to connect to «correct» providers.[14] The open joint stock company «Ukrtelekom»; the joint enterprise «Infocom»; the Limited Liability Company (LLC) «Global Ukraine»; LLC «Elvisti»; LLC «UkrSat»; LLC «Luckynet»; LLC «Citynet»; LLCC «Maket»; LLC «Golden Telecom»; LLC «Adamant» and LLC «Optima special communications». The last three were joined to the list in 2006.

According to specialists, the SBU already illegally intercepts messages and carries out constant surveillance over approximately 50 % of the Ukrainian traffic. The level of surveillance, moreover, at the regional level can rise to 90% since regional providers find it harder to stand up to the SBU.

The Ministry of Justice of Ukraine, in response to a letter from the Internet Association of Ukraine regarding the legality of Order No. 122 of the State Committee on Communications stated

[12] Address given by the Minister of Internal Affairs V. Tsushko at a plenary session of the Verkhovna Rada on 23 February 2007 with regard to the situation in the Ministry of Internal Affairs // http://mvsinfo.gov.ua/official/2007/02/230207_2.html.
[13] Draft Law from 06.10.2006. No. 2288, tabled by National Deputy V.D. Shvets.
[14] The Internet publication «Maidan» http://maidan.org.ua/static/news/1113766876.html.

that it was legal, however later, on 23 November 2005, this time answering the same question posed by the UHHRU, it declared it unlawful.[15]

«*At the same time, with regard to the issue of the Order of the State Committee for Communications No. 122 of 17.06.2002, we would state that the Ministry of Justice in a letter dated 13 October 2005 No. 37229-24 called upon the Ministry of Transport and Communications within a five-day period to declare no longer in force the Order No. 122 of the State Committee for Communications and Computerization of Ukraine from 17.06.2002*».

And indeed, in accordance with Conclusion of the Ministry of Justice from 4 August 2006 No. 13/71, Order No. 122 was removed from the State Register of normative legal acts on 21 August 2006. The given normative act has thus become null and void. Yet regardless of this, all the activities carried out on the basis of that Order continue to this day. No equipment has been dismantled, and the list of providers is in fact still functioning.

UHHRU approached the Security Service of Ukraine asking on what grounds the Internet was continuing to be monitored when Order No. 122 had been revoked. The SBU's reply stated that such activities were on the basis of the Law on investigative operations. However, given the functioning of a monitoring system, doubts arise as to whether constant monitoring is really carried out solely within the boundaries of investigative operations launched. The point is that the specific nature of the monitoring demands constant surveillance of traffic, and not selective surveillance, largely of a specific person.

2. THE CASE OF VOLOKHY V. UKRAINE[16]

In this case, the applicants Olga and Mykhaylo Volokh who live in Poltava complained about the interception and seizure of their postal and telegraphic correspondence and the violation of their right to of their right to respect for their correspondence as provided in Article 8 of the European Convention on Human Rights.

THE CIRCUMSTANCES OF THE CASE

In May 1996 the Poltava Regional Police Department (hereinafter – the PRPD) instituted criminal proceedings for tax evasion against Mr V., who is, respectively, the son of the first applicant and the brother of the second applicant. On 28 May 1996 the investigator placed Mr V. under an obligation not to abscond.

On 4 September 1996, following the failure of Mr V. to appear for interrogation and in the absence of information about his whereabouts, an arrest warrant for Mr V. was issued.

On 6 August 1997 the PRPD investigator issued an order for interception and seizure of the postal and telegraphic correspondence of the applicants (hereinafter – «the interception order») on the following grounds:

«The private entrepreneur Mr V., during the period between 1 January 1994 and 1 January 1996, intentionally did not pay taxes to the State budget in the amount of UAH 12,889[17], having caused damage and substantial losses to the State. On 28 May 1996 the preventive measure – obligation not to abscond – was ordered in respect of Mr V., but, having been summoned by the investigator, Mr V. did not come to him, and his whereabouts at the present are unknown. On 4 September 1996 the preventive measure – detention – was ordered in respect of Mr V. ... Mr V. may inform his mother and brother about his whereabouts, using the postal and telegraphic correspondence.»

On 11 August 1997 the President of the Zhovtnevyy District Court approved the interception order by having signed it. The applicants maintained that they had learned about this order by chance at the end of 1998.

[15] The full text of the response is available at the UHHRU site: http://www.helsinki.org.ua/index.php?id= 1132741095

[16] Judgment of the European Court of Human Rights from 2 November 2006 (No. 23543/02) The spelling of the names of people and places is that of the Judgment. Since some parts of the text are from the Judgment, but there are differences or omissions, the numbers of the ECHR document are only given where there is a large jump – *translator*)

[17] Equivalent of USD 7,045.09 in 1996

On 4 May 1998 the criminal case against Mr V. was terminated as being time-barred.

According to the applicants, Mr V. had appeared in summer 1998 and met with the investigator in his case. During this meeting he found out about the interception order. On 28 May 1999 the PRPD investigator cancelled the interception order on the grounds that the criminal case against Mr V. had been closed and there were no further need to intercept the applicants' correspondence. This cancellation was approved and signed by the President of the Zhovtnevyy District Court the same day.

By letter of 19 July 1999, the Poltava Regional Prosecutor's Office, in reply to their complaint, informed the applicants that the interception of their correspondence had been ordered lawfully and therefore the law-enforcement officers incurred no liability.... By letter of 6 January 2000 to Mr V., in reply to his complaints about the criminal proceedings against him, the General Prosecutor's Office noted, interalia, that the interception order was not well-founded. By letter of 1 February 2000, the first applicant was informed that on 15 August 1997 (15 September 1997 according to the Government) a letter addressed to her had been intercepted by the police but, as it contained no information about the whereabouts of Mr V., it was not seized but was forwarded to her.

On 20 January 2000 the applicants claimed compensation from the Head of the PRPD for the damage caused by ordering the interception of their correspondence. By letter of 27 January 2000, the Head of the PRPD informed the second applicant that the interception order had been lawful and that, therefore, there were no grounds to award damages.

On 18 February 2000 the applicants lodged a claim with the Leninsky District Court of Poltava against the PDPR seeking compensation for the moral damage caused by the interference with their correspondence. In support of their claim, they referred to the letter of the GPO of 6 January 2000, where it was acknowledged that the interception order lacked grounds.

On 11 October 2001 the Leninsky District Court found against the applicants. The court concluded that the interception order had been lawful and well-founded, the criminal proceedings against Mr V. having been terminated on non-exonerative grounds (нереабілітуючі обставини), and that the applicants did not prove that they had suffered any moral damage due to the interference with their correspondence. The court held that the applicants' claim was unsubstantiated and that the General Prosecutor's Office's letter of 6 January 2000 could not be a ground for awarding them any damages. It, therefore, rejected the applicants' claim in full.

On 8 January 2002 the Appellate Court of Poltava Region upheld the decision of the first instance court. On 9 February 2004 the panel of three judges of the Supreme Court rejected the applicants' request for leave to appeal in cassation.

By letter of 19 November 2000, the Head of the PRPD informed the second applicant that the seizure of correspondence had been in compliance with the law and that the applicant had no right to compensation, given that the criminal case against his brother had been terminated on non-exonerative grounds. By letter of 21 November 2000, the Poltava Regional Prosecutor's Office informed the second applicant that the issue of compensation was within the competence of the courts.

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

A. Whether there has been an interference

5. It was not disputed by the parties that the decision on interception of the applicants' correspondence constituted «an interference by a public authority» within the meaning of Article 8 § 2 of the Convention with the applicants' right to respect for their correspondence guaranteed by paragraph 1 of Article 8.

B. Whether the interference was justified

The cardinal issue that arises is whether the above interference is justifiable under paragraph 2 of Article 8. ... The Court reiterates that powers of secret surveillance of citizens in the course of criminal investigations are tolerable under the Convention only in so far as strictly necessary.[18]

[18] See, mutatis mutandis, Klass and Others v. Germany, judgment of 6 September 1978, Series A no. 28, p. 21, § 42

If it is not to contravene Article 8, such interference must have been «in accordance with the law», pursue a legitimate aim under paragraph 2 and, furthermore, be necessary in a democratic society in order to achieve that aim.

The Government maintained that the decision on interception of the applicants' correspondence had been given in accordance with Article 187 of the Code of Criminal Procedure. The applicants did not contest this argument, but maintained that the provisions of Article 31 of the Constitution had not been respected.

The Court notes that Article 31 of the Constitution, Article 187 of the Code of Criminal Procedure and Article 8 of the Law «on search and seizure activities»[19] provided for the possibility to conduct interception of the correspondence in the framework of criminal proceedings and the search and seizure activities (see paragraphs 25-27 above).

There was, therefore, a legal basis for the interference in domestic law.

As regards the requirement of foreseeability, the Court reiterates that a rule is «foreseeable» if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct. The Court has stressed the importance of this concept with regard to secret surveillance in the following terms[20]

«The Court would reiterate its opinion that the phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the 'law', requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention ... The phrase thus implies – and this follows from the object and purpose of Article 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ...

Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.»

The Court notes in this connection that the requirements of proportionality of the interference, and of its exceptional and temporary nature were stipulated in Article 31 of the Constitution and Article 9 of the Law of Ukraine «on Search and Seizure Activities» of 18 February 1992 (see paragraphs 25 and 27 above). However, neither Article 187 of the Code of Criminal Procedure in its wording at the time of the events, nor any other provision of Ukrainian law contained a mechanism which would ensure that the above principles were respected in practice. The provision in question (see paragraph 26 above) contains no indication as to the persons concerned by such measures, the circumstances in which they may be ordered, the time-limits to be fixed and respected. It cannot therefore be considered to be sufficiently clear and detailed to afford appropriate protection against undue interference by the authorities with the applicants' right to respect for their private life and correspondence.

Furthermore, the Court must be satisfied that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security and public order entails the risk of undermining or even destroying democracy on the ground of defending i.[21]). Such safeguards must be equally established by law in unequivocal manner and be applied to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, inter alia, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which

[19] The law mentioned here Про оперативно-розшукову діяльність is also referred to in this text and elsewhere as the Law on Investigative Operations (*translator*)

[20] (see the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, p. 32, § 67, reiterated in Amann v. Switzerland [GC], no. 27798/95, § 56, ECHR 2000-II):

[21] See the Klass and Others judgment cited above, pp. 23-24, §§ 49-50

should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure[22]

In the instant case, the Court observes that the review of the decision on interception of correspondence under Article 187 of the Code of Criminal Procedure was foreseen at the initial stage, when the interception of correspondence was first ordered. The relevant legislation did not provide, however, for any interim review of the interception order in reasonable intervals or for any time-limits for the interference. Neither did it require or authorise more involvement of the courts in supervising interception procedures conducted by the law-enforcement authorities. As a result, the interception order in the applicants' case remained valid for more than one year after the criminal proceedings against their relative Mr V. had been terminated and the domestic courts did not react to this fact in any way.

The Court concludes that the interference cannot therefore be considered to have been «in accordance with the law» (see paragraph 49 above) since Ukrainian law does not indicate with sufficient clarity the scope and conditions of exercise of the authorities' discretionary power in the area under consideration and does not provide sufficient safeguards against abuse of this surveillance system.

It follows that there has been a violation of Article 8 of the Convention arising from the interception of the applicants' correspondence.

ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

The applicants complained about a lack of domestic remedies to seek redress for the unlawful interference with their correspondence. They relied on Article 13 of the Convention.

The Court recalls its reasoning in the Klass case (cited above, §§ 68-70), in which it observed that it was the secrecy of the measures which rendered it difficult, if not impossible, for the person concerned to seek any remedy of his own accord, particularly while surveillance was in progress. Nevertheless, in the Klass case it was established that the competent authority was bound to inform the person concerned as soon as the surveillance measures were discontinued and notification could be made without jeopardising the purpose of the restriction, and such person had a number of remedies available to him or her. Moreover, in the Klass case the Court took into account the existence of a system of proper control over surveillance measures and found no violation of Article 13.

From the Government's submissions, *it does not appear that the Ukrainian legal system offered sufficient safeguards to persons under surveillance, because there was no obligation to inform a person that he or she was under surveillance.* Even when the persons concerned learned about the interference with their correspondence, like in the present case, the right to question the lawfulness of the decision on interception as guaranteed by the domestic law (see paragraphs 25 and 27 above) appears to be limited in practice, since the only implementing mechanism is provided by the Law of Ukraine «on the procedure for the compensation of damage caused to the citizen by the unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts». In the Court's opinion, this Law, which is worded in very general terms at least in so far as persons other than the accused are concerned, could have a remedial effect in situations comparable to the one of the applicants, touched by surveillance measures in the context of criminal proceedings against a third person. However, its application and interpretation by the domestic courts, as in the present case, does not appear to be sufficiently broad to encompass complaints of persons other than the accused.

The foregoing considerations are sufficient to enable the Court to conclude that the applicants did not have an effective domestic remedy, as required by Article 13, in relation to their complaints under Article 8 of the Convention about the surveillance measures involving their postal and telegraphic correspondence.

The Court therefore dismisses the Government's preliminary objection and holds that there has been a breach of Article 13 of the Convention.

[22] See the Klass and Others judgment cited above, pp. 25-26, § 55

3. INFORMATION PRIVACY AND PERSONAL DATA PROTECTION

On 22 December 2005 parliament passed the Law «On access to court rulings». From 1 June 2006 an information system has been accessible via the Internet containing rulings handed down by Ukrainian courts. Previously only parties to a specific case had access to the rulings. In order to protect the right to privacy of parties in court proceedings, the Law allows for personal information to be removed.

Ukraine has not become a signatory to the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, No. 108. However in 2005, a Ministry of Justice working group which includes nongovernmental organizations involved in defending the right to privacy began work in this field.

The Action Plan Ukraine – EU for 2005 stipulates the ratification of Convention No. 108 and the Additional Protocol to it, with the necessary amendments introduced at the same time to domestic legislation. This has yet to be implemented.

During 2005 and 2006 this working group drafted a Law «On Personal Data Protection» which incorporates the provisions of the above-mentioned Council of Europe Convention, the Directive 95/46/ЄС of the European Parliament and the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, the Directive 97/66/ec of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, as well as the Recommendations of the Council of Europe Committee of Ministers concerning personal data. The Draft Law has still not been tabled in parliament.

During 2006 parliament continued its consideration of another draft law «On Personal Data Protection»[23]. This had been passed in its first reading back in 2003. In March 2006 it was passed in full. However it totally failed to take on board European standards of personal data protection, sometimes confusing these with technical protection of databases. The draft presented no serious safeguards of privacy in automated systems. A number of organizations approached the President asking him to use his power of veto, which he did. On 3 November an attempt was made to charge it through without taking the President's suggestion into consideration, however the attempt failed and the draft was sent back for reworking. At that time Ministry of Justice personnel became involved in the process. They effectively used the variant drafted by the working group and took into account most European standards of personal data protection. On 9 January 2007 the draft law was passed in a significantly reworked and improved version and having taken into consideration the President's suggestions. However, without any particular grounds, the President once again vetoed the draft. Then in February it was again not passed by parliament and sent back for further refinement.

Meanwhile, without a normative base for personal data protection, discussion of draft laws has been continuing in parallel to the actual creation of a Single State Automated Register of Individuals as well as other state registers containing personal data, including a register of voters.

Parliament has in past years repeatedly rejected draft laws on creating such a Register.

In response to this and despite the lack of any legal grounds, on 30 April 2004 the then President issued Decree No. 500 «On the Creation of a Single State Register of Individuals» which sanctioned the creation and running of a Single Register The Decree empowered the Ministry of Internal Affairs to create and maintain this single register on the basis of a Single State Automated Passport System (hereafter – SSAPS), based on a concept approved by a Cabinet of Ministers Resolution back in 1997.

In order to carry out the work on creating SSAPS, the Ministry of Internal Affairs appointed the private company «Corporation «SSAPS». This meant that personal data which Ukrainian citizens passed to a government agency were then passed on to a private structure. Later the MIA management also empowered this private structure with the issue of passport forms, the State Automobile Inspection [traffic police] database, and so forth.

[23] Draft Law No. 808 from 25.05.2006 (from 10.01.2003 No. 2618 prior to the 2006 parliamentary elections). Authors: M. Rodionov, S. Nikolayenko, I. Yukhnovsky and P. Tolochko).

President Yushchenko with his Decree No. 457 from 10 March 2005 revoked President Kuchma's Decree from 30 April 2004 «On the Creation of a Single State Register of Individuals», together with the plan for introducing a new style of passport in the form of a plastic card on the basis of SSAPS .[24]

Nonetheless on 15 December 2006 parliament passed in its first reading a draft law «On a National Demographic Register».[25] This draft is a reworded version of the old draft laws on a Single State Automated Register of Individuals.

The main point of this and previous draft laws is to create a single automated database about members of the public whereby all information about any Ukrainian citizen gathered by any government body or State institution will be held under one number. Such a system will inevitably lead to violations of privacy. Precisely for that reason, the Hungarian Constitutional Court back in 1991 declared an analogous system unconstitutional. There is no such system in any developed democratic country. Yet parliament has begun creating it. Effectively, as can be seen from the above, the system is being created in practice, without any proper legal grounding.

At the beginning of 2007 parliament passed a law on a State Register of Voters. The draft law had been in parliament since February 2004. It should be noted that this draft law is particularly strong on observing the right to privacy although it does not contain procedure for independent control over the use of the register.

President Yushchenko instructed the Head of Ukraine's Council of National Security and Defence (CNSD), Anatoly Kinakh to prepare a session of the CNSD on improving work connected with the preparation, registration and issue of passport documents and bringing them into line with international standards for systems of individual registration. On 23 February 2006, on the basis of an Instruction from the Secretary of the CNSD, the appropriate working group was created. Such a development shows that the issues of a passport system and personal registration are considered to have implications for national security.

However, despite the lack of legislative regulation and the cancellation of the relevant Presidential Decrees, the MIA is still continuing to create the Single State Automated Passport System, with financing from the State Budget being allocated for this, and passports f nternational travel are still issued according to the previously established format.

In October 2005 the MIA submitted a package of documents to the Cabinet of Ministers in order to «*produce a Ukrainian citizen's card, this being a plastic card with an inserted electronic chip which will be extremely secure. The chip will contain the card number which will be the same for the Tax Service, and for the Pension Fund. The chip will contain all necessary information about the person, and in addition it will be possible to add information about whether the person has a driving licence*.»

In 2005 and 2006 implementation of this initiative had not formally begun although in practice the MIA have long been carrying it out without any legal basis.

In response to this initiative, the UHHRU sent a letter to the Prime Minister and also began a campaign collecting signatures for an open letter to those in power, which more than 100 people endorsed.[26] The human rights activists were demanding what would seem at first glance to be simple things, which those in authority could simply not understand:

1) With regard to plastic cards

– that a Law on Personal Data Protection be passed;

– that such cards be prepared only by a STATE structure;

– that a person should be given the opportunity to learn what data was contained in;the card chip and to have it changed.

2) With regard to the individual identification code:

– that different codes should be used separately, and that a SINGLE code for accumulating all information about a person should not be created;

[24] MIA Public Relations Department http://mvsinfo.gov.ua/official/2005/03/031805_1.html

[25] Draft law from 14.09.2006. No 2170. The authors were V. Tsushko, A. Semynoha, M. Onishchuk and othersi.

[26] More information available on the UHHRU website (in Ukrainian) http://www.helsinki.org.ua/index.php?id=1130842348, http://www.helsinki.org.ua/index.php?id=1128526519.

– that codes should be used ONLY for the purpose for which they were designed;
– that their use should be determined by a Law on Personal Data Protection.

At the present time the main electronic classifier on the basis of which personal data is gathered and processed is the identification code which is issued by the State Tax Administration. The sphere of its use is constantly being expanded and far exceeds the aim for which it was introduced, that is, tax registration. Without an identification code one cannot legally find work, have access to pensions, exercise ones right to education, receive a student grant or unemployment benefit, organize concessions, open bank accounts, register business activities, etc.

Therefore in reality we have a situation where the administrative practice of State executive bodies is knowingly violating the Law of Ukraine on a Single Register of Individual taxpayers, and is using the tax number for purposes not envisaged in by this Law.

Another serious problem is that the authorities and State institutions regularly divulge confidential information about individuals. It is a standard occurrence for information to be disclosed about a person's state of health, their income and so forth.

You can obtain computer data containing confidential information anywhere. This can be seen from the following advertisement.

WE DRAW YOUR ATTENTION TO THE LATEST DATABASES

Telephone: 8–066–295–91–36

1. State Customs Committee of Ukraine 2003/2004/2005/2006 Database on foreign economic activity

(customs) ** 250 UAH*

Sender, address of: sender, recipient, recipient's address, bank code, MFO [bank no.], address of the bank, account no., person responsible for financial regulation, his/her address; type of goods, weight, value, direction (import–export)

2. Ukraine – Ministry of Statistics – 2006.01.01 ** 250 UAH*

Organizations, addresses, telephones, institutions, staff, infringements, cases of liquidation

3. Physical persons ** 250 UAH*

Surname, first name, patronymic, date code was received, date of birth, place of birth, place of residence, telephone, sex

4. Income of physical persons in Ukraine 2004/2005 ** 400 UAH*

Income and taxes, place of work, information about employer

5. State Tax Administration 2005 ** 250 UAH*

Tax [Administration] of Ukraine 20045 + State Committee of Statistics of Ukraine

Database on Ukrainian registered businesses. All information on each business, including: name, legal and actual address, registration number, date of registration, registering body, size of statutory funds, information about the founders, etc 981,000 businesses. 1.5 Gb as of 20 December

6. State Register of Businesses ** 250 UAH*

Registration data about businesses, their founders, account numbers of the businesses, addresses, branches, foreign representative officers.

And also all databases on Russia

Yet the State Tax Administration [STA] which administers the majority of these databases maintains that they have no recorded leaks of information. On the other hand there is simply no other way of obtaining this information except through copying the database at the STA.

The investigation by law enforcement agencies into this case is continuing.

According to figures from SBU, over 2006 28 attempts to sell databases of State institutions and organizations containing confidential information held by the State were thwarted.[27] No more detail is available about these cases, for example, whether the individuals were convicted and what databases exactly were they trying to sell.

The All-Ukrainian Network of People Living with HIV/AIDS reports of many cases where medical diagnoses of people were HIV have been disclosed. In a lot of regions people with AIDS are issued with special documents which render the confidentiality of such diagnoses meaningless.

On 25 July 2006 the Pechersky District Court in Kyiv concluded its examination of the administrative claim lodged by Svitlana Yurivna Poberezhets, an anaesthetist and resuscitation expert from the Vinnytsa City Clinical Hospital against the Ukrainian Ministry of Health, the Ministry of Employment and Social Policy of Ukraine, the Social Insurance Fund for Temporary disability and the Industrial accident and occupational diseases which have caused disability Fund and the Ministry of Justice of Ukraine. She was demanding that the court recognize as unlawful the normative legal act in the form of a Joint Order of the administrative respondents «On approving the form and technical description of a medical certificate and instructions on the procedure for filling in the form on temporary inability to work». In her administrative claim, Svitllana Poberezhets argued that the requirement to provide information about a person's diagnosis and the code of their illness according to the International Classification of Diseases should be declared unlawful as it violated the constitutional right of Ukrainian citizens to privacy ((confidentiality of medical records).

The ruling was not appealed and has come into force. From now on Ukrainian doctors may not indicate the diagnoses of their patients on medical certificates, this meaning that those at work will not be able to find about what the employee's illness was. In 2005 almost 11 million such medical certificates were issued in Ukraine.[28]

The Vinnytsa Human Rights Group (VHRG) considers the ruling of the Pechersky District Court in the case involving medical certificates to be an important precedent and a breakthrough in protecting personal information in Ukraine. At the same time, the VHRG notes that there are a whole range of other normative legal acts issued by the Ministry of Health which enable the disclosure of private information about a person's state of health (for example, information about a person's diagnosis is provided according to where they are studying by adding it to the section «Diagnosis» in the certificate for being released from lessons or lectures). Information about children's health condition is virtually on open access in schools and there have been cases where such information was disclosed.

THE CASE OF PANTELEYENKO V. UKRAINE

The European Court of Human Rights in the Case of Panteleyenko v. Ukraine[29] found that the right to privacy had been infringed over disclosure of information. In December 2001 12. In December 2001 Mr Panteleyenko instituted proceedings in the Novozavodsky Court against the Chernigiv Law College and its Principal for defamation. He alleged that, during the Attestation Commission's hearing on 14 May 2001, the Principal had made three statements about him which were libellous and abusive, including one rudely questioning his mental health. The applicant demanded apologies and compensation for moral damage.

[27] SBU Press Centre report from 2 October 2006 // www.sbu.gov.ua. See also: : http://ssu.gov.ua/sbu/control/uk/publish/article?art_id=58025&cat_id=39574.

[28] Svitlana Poberezhets was represented in court by UHHRU lawyer Viacheslav Yakubenko and coordinator of the Vinnytsa Human Rights Group Dmytro Groisman. The case was supported by the UHHRU Legal Aid Fund for Victims of Human Rights Abuse which receives financial support from the International Renaissance Foundation. More information is available in English at: http://khpg.org/en/index.php?id=1156207989 and http://khpg.org/en/index.php?id=1154644514.

[29] Judgment of the European Court of Human Rights from 29 June 2006 (No. 11901/02).

During the trial, one of the applicant's main arguments was that he had never suffered any mental health problems. He adduced to this effect a certificate supposedly issued by a psychiatric hospital, attesting that the applicant had never been treated there.

The case of the defence was that the Principal had never uttered the obscenities attributed to him by the applicant. However, they challenged the authenticity of the above certificate and asked the court to verify the applicant's assertions. On 21 March 2002 this application was granted and the Chernigiv Regional Psycho–Neurological Hospital was requested to provide information as to whether the applicant had undergone any psychiatric treatment. On 3 April 2002 the hospital submitted to the court a certificate to the effect that for several years the applicant had been registered as suffering from a certain mental illness and underwent in–patient treatment in different psychiatric establishments. However, several years earlier his psychiatric registration had been cancelled due to long–term remission (a temporary lessening of the severity) of the disease. This information was read out by a judge at one of the subsequent hearings; however, no reference to this evidence was made in the final judgment.

On 3 June 2002 the Novozavodsky Court rejected the applicant's claim as unsubstantiated. The court found, inter alia, that the applicant had failed to prove that the defendant had made any remarks about his sanity.

The applicant appealed, challenging, inter alia, the lawfulness of the court's request for information about his mental state.

On 1 October 2002 the Court of Appeal upheld the judgment in substance. On the same day the court issued a separate ruling to the effect that the first instance court's request for information concerning the applicant's mental health from the public hospital was contrary to Article 32 of the Constitution, Articles 23 and 31 of the Data Act 1992 and Article 6 of the Psychiatric Medical Assistance Act 2000. In particular, it was indicated that information about a person's mental health was confidential, and its collection, retention, use and dissemination fell under a special regime. Moreover, the court held that the requested evidence had no relevance to the case.

Summing up the above considerations, the Court of Appeal found that the judges of the lower courts lacked training in the field of confidential data protection and notified the Regional Centre for Judicial Studies about the need to remedy this lacuna in their training programme.

On 24 June 2003 the Supreme Court rejected the applicant's request for leave to appeal under the cassation procedure.

In the instant case, the domestic court requested and obtained from a psychiatric hospital confidential information regarding the applicant's mental state and relevant medical treatment. This information was subsequently disclosed by the judge to the parties and other persons present in the courtroom at a public hearing.

The Court finds that those details undeniably amounted to data relating to the applicant's «private life» and that the impugned measure led to the widening of the range of persons acquainted with the details in issue. The measures taken by the court therefore constituted an interference with the applicant's rights guaranteed under Article 8 of the Convention (Z v. Finland, judgment of 25 February 1997, Reports of Judgments and Decisions 1997–I, § 71).

The principal issue is whether this interference was justified under Article 8 § 2, notably whether it was «in accordance with the law» and «necessary in a democratic society», for one of the purposes enumerated in that paragraph.

The Court recalls that the phrase «in accordance with the law» requires that the measure complained of must have some basis in domestic law (cf. Smirnova v. Russia, nos. 46133/99 and 48183/99, § 99, ECHR 2003–IX (extracts)).

It is to be noted that the Court of Appeal, having reviewed the case, came to the conclusion that the first instance judge's treatment of the applicant's personal information had not complied with the special regime concerning collection, retention, use and dissemination afforded to psychiatric data by Article 32 of the Constitution and Articles 23 and 31 of the Data Act 1992, which finding was not contested by the Government. Moreover, the Court notes that the

details in issue being incapable of affecting the outcome of the litigation (i.e. the establishment of whether the alleged statement was made and the assessment whether it was libellous; compare and contrast, Z v. Finland, §§ 102 and 109), the Novozavodsky Court's request for information was redundant, as the information was not «important for an inquiry, pre–trial investigation or trial», and was thus unlawful for the purposes of Article 6 of the Psychiatric Medical Assistance Act 2000.

The Court finds for the reasons given above that there has been a breach of Article 8 of the Convention in this respect.

4. TERRITORIAL PRIVACY

A major problem with respect to territorial privacy is seen in the shortcomings in legislation and even worse administrative practice over carrying out body searches or searches of a person's home or workplace. Article 8 of the Convention also mentions respect for each person's home.

For example, in the case mentioned above of Panteleyenko v. Ukraine, the Court also found that there had been a violation of Article 8 with respect to the search procedure. Criminal proceedings had been instituted against Mr Panteleyenko and a search was carried out of his office during which certain items were seized. In January 2000 the applicant instituted proceedings against the Prosecutor's Office, seeking monetary compensation for the material and moral damage suffered as a result of the allegedly unlawful search of his office (i.e. loss of or damage to personal items and the seizure of documents essential for his professional activity).

On 28 August 2000 the Novozavodsky District Court of Chernigiv granted this claim. The court declared the search of the applicant's office «to have been conducted unlawfully». In particular, it established that in breach of Article 183 of the Code of Criminal Procedure (hereafter «the CCP») the investigator, being well aware of the applicant's whereabouts (at that time he was undergoing hospital treatment), had failed to serve the search warrant on him. Moreover, contrary to Article 186 of the CCP, the authorities, instead of collecting the evidence relating to the criminal case, had seized all the official documents and certain personal items in the applicant's office. This had effectively denied the applicant the possibility of performing his professional duties until 6 August 1999, when the relevant documents and items were returned to him. The court awarded the applicant UAH 14,140[30] in material and UAH 1,000[31] in moral damages.

On 16 January 2001 the Chernygiv Regional Court, on an appeal by the Prosecutor's Office, quashed the decision of 28 August 2000 and remitted the case for fresh consideration...

(19). On 26 December 2001 the Novozavodsky Court examined the applicant's claim and rejected it as being unsubstantiated. The court, referring to the Prosecutor's Office's ruling of 4 August 2001, found that the applicant's case had been closed on non-exonerative grounds, within the meaning of Article 2 of the Law of Ukraine «On the procedure for compensation of damage caused to the citizen by unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts» 1994, and therefore the applicant had no standing to claim compensation for any acts or omissions allegedly committed by the authorities in the course of the investigation.

It should furthermore be noted that the courts had not found the search to be lawful and had rejected it on the grounds that it had no relevance for this case. Despite the fact that the rights of the individual had been violated, he had been unable to receive compensation since it was stated that this was possible only where proceedings were terminated on exonerating circumstances [реабілітуючи обставини).

The European Court of Human Rights therefore found that the search had been carried out unlawfully and that there had been a violation of Article 8. The Court also found that the lack of a national effective remedy against violations of this right constituted a violation of Article 13 of the Convention.

[30] 2,315 euros (EUR)
[31] EUR 165

5. OTHER ASPECTS OF PRIVACY AND RESPECT FOR FAMILY LIFE

In cases involving adoption, Ukrainian legislation does not take the interests of the adopted child into consideration. Confidentiality of adoption is guaranteed by the fact that the adoptive parents may register themselves as the child's biological parents (Article 229 of the Family Code), change the information about the place of birth within 6 months of the child's birth (Article 230 of the Family Code), while disclosure about a case of adoption is subject to criminal liability. (Article 168 of the Criminal Code of Ukraine). However the right of a child to know his or her biological parents (Article 7 of the UN Convention on the Rights of the Child) and the right to preserve his or her identity (Article 8 of the UN Convention on the Rights of the Child) are entirely forgotten. Even more, the law contains provisions for keeping the adoption secret from the child him or herself. (paragraph 2 of Article 226 of the Family Court).[32]

The issue continues to be problematical of the compulsory medical examinations, as well as the intrusion of law enforcement agencies into the family lives of people with non-traditional sexual orientation. For example, law enforcement agencies continue to notify the State Committee of Statistics about people they know to be homosexuals, and keep a register of them as a group at risk of AIDS.[33] In response to a formal request for information from the Vinnytsa Human Rights Group, the MIA officially notified that in 2005 131 homosexuals in Ukraine had been «identified» (!).

There are also problems with compulsory medical procedures, for example, centralized vaccination of children. If children don't have such vaccinations, they are not accepted in a school or kindergarten. Yet the actual vaccination procedure is not without controversy. At present, the Ministry of Health carries out 12 such compulsory vaccinations and is planning to considerably increase this number.

There was also discussion in the media about voluntary medical examinations for people entering into marriage. In this case the voluntary nature of such examinations is stipulated[34]. In practice, however, sometimes no choice is given, and some public officials have spoken of possibly making such examinations compulsory.

The State Department of Ukraine for the Execution of Sentences on 25 January 2006 issued Order No. 13 «On approving instructions for checking the correspondence of people held in penal institutions and pre-trial detention centres». Item 1.7 of this Order states that the envelope of outgoing letters should have the full address of the penal institution stamped on it. This is in our view an excessive restriction on the right to privacy both of prisoners and of their families. For example, a father will no longer write to his son from penal institution if the son is doing his military service.

In cases involving the application of Article 8 of the European Convention brought against Ukraine, violations of the right to ones own name, this being a part of the right to privacy, warrant mention. These issues were reviewed by the Court in the case of Bulgakov v. Ukraine which the European Court of Human Rights declared admissible on 22 March 2005. On 6 September 2005 the Verkhovna Rada passed in its first reading a draft law «On changing an individual's name» (No. 7356 from 13 April 2005), however on 2 November 2006 this was withdrawn without any cogent reasons being provided.

During 2006 UHHRU received numerous complaints from prisoners saying that they were unable to get divorced or married while serving terms of imprisonment. According to legislation, to do this, people need to personally turn up with their identification documents at the State Register Office. This is clearly not possible for prisoners. At the same time the Register Office refused to go to penal institutions, while the penal administrations refused to take prisoners under escort to them. This situation is a violation of the right to marriage and family life.

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[32] The right to respect for personal and family life: civil and legal aspects in Ukrainian legislation and court practice (in Ukrainian). Y. Petrova. The European Convention on Human Rights: Main provision and practical application, the Ukrainian context/ edited by O.L.Zhukovska. – Kyiv: «BIPOL», 2004, p. 403

[33] The Report on the results of the work of law enforcement bodies in fighting prostitution, in identifying high-risk groups and the results of their testing for AIDS, approved by Order of the State Department of Statistics from 10 December 2002 No. 436

[34] Cabinet of Ministers Resolution No. 1740 from 16 November 2002.

UHHRU addressed an appeal to the Ministry of Justice requesting that the situation be resolved via normative acts regulating the work of the State Register Office. The Ministry entirely agreed and acknowledged the problem, however said in their response that the laws needed to be changed, «for which the preparation of the relevant draft has begun». Almost a year has passed and there is still no sign of such a draft law.[35]

6. RECOMMENDATIONS

1) Adopt a law «On personal data protection» complying with modern European standards for the protection of privacy.

2) Ratify the Convention of the Council of Europe No. 108.

3) Pass a law «On interception of telecommunications» which will allow for independent monitoring of the activities of the Security Service of Ukraine in intercepting communications, publishing an annual report with depersonalized information regarding the interception of information from communications channels in the course of investigative operations. Remove generalised data on investigative operations from the «List of Items of information which constitute state secrets».

4) Introduce amendments to legislation clearly stipulating in procedure for interception of communications (wiretapping of landlines and mobile telephones, surveillance of electronic mail, control over checks on information on the Internet, the following):

– Procedure for court warrants for such activities and the time limits they are valid for;

– Procedure for periodic review by the court of the warrant issued;

– Information to the person about communications having been intercepted after the procedure is over and a decision has been taken not to institute or to terminate criminal proceedings;

– The right of an individual to appeal against these actions and demand compensation if the actions of the authorities were unwarranted;

– Procedure for storage and later use of the data obtained.

5) Ensure that a Single State Automated Passport System is only introduced on a legal basis and taking into consideration the provisions of the Convention of the Council of Europe No. 108. The preparation of documents confirming citizenship of Ukraine, the creation of a SSAPS, and other activities involving confidential information, must only be carried out by government agencies.

Legislation on automated processing of personal data must reflect the following principles:

– different codes (databases of different authorities) must be used separately, and not allowing a SINGLE code for gathering all information about a person;

– a person must know what information is being gathered on any given database and have the right to change that information;

– the codes must be used ONLY for those purposes for which they were created;

– their use must be allowed for in the Law on protection of personal information;

– exchange of information gathered between the authorities must be clearly regulated. and carried out on the basis of a court order with the person both notified and able to appeal against the actions.

6) Stop the practice of illegally using taxpayers' identification codes for other purposes than those stipulated by law.

7) The Ministry of Internal Affairs must stop the unwarranted collection of sensitive personal information about individuals (information regarding their political views, religious beliefs, sexual orientation, etc.)

8) Stop the intrusion of state executive bodies into the activities of those involved in providing Internet services by forcing them to install equipment for the interception of telecommunications.

9) Abolish the licensing of IP-telephone systems.

10) Introduce amendments to legislation setting out separate divorce and marriage procedure for prisoners.

[35] More details available in English at: http://www.helsinki.org.ua/en/index.php?id=1157539114.

11) Pass a law and other normative legal acts protecting the rights of patients, in particular as regards compulsory medical procedure and confidentiality of information about a patient's condition.

12) Establish procedure in criminal proceedings making it possible to appeal against the actions of law enforcement agencies in searching a person, his/her home or workplace, as well as providing the possibility of seeking redress if this procedure is infringed.

13) Change legislation on keeping adoption information secret even from the child involved.

14) Change Order No. 13 of the State Department of Ukraine for the Execution of Sentences from 25 January 2006 «On approving instructions for checking the correspondence of people held in penal institutions and pre-trial detention centres», removing the requirement to place the full address of the penal institution on the envelope of outgoing mail.

VI. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION[1]

1. OVERVIEW

No fundamental changes took place in 2006 with regard to freedom of conscience and religion, with legislative regulation and administrative practice remaining virtually unchanged. For this reason, the information, together with the conclusions and recommendations made in the reports «Human Rights in Ukraine» for 2004 and 2005[2] remain relevant today.

Number of religious organizations in Ukraine[3]

	1992	1995	1998	2000	2001	2002	2003	2005	2007
Registered religious organizations	12 962	15 787	19 631	22 518	24 311	25 942	27 286	29 699	31 227
Unregistered religious organizations that have provided notification of their activities		1 197	775	1 025	1 094	1 130	1 101	1 106	1 836
Total	12 962	16 984	20 406	23 543	25 405	27 072	28 387	30 805	33 063

The most controversial norms of the Law «On freedom of conscience and religious organizations» have remained unchanged which led to and indeed continues to provoke numerous complaints, and is frequently a source of conflict. Problems arise over, for example, religious groups having a single structure forced upon them, places of worship needing to be shared by two or more religious organizations, limitations on the rights of foreign nationals, a permission-based system for holding religious gatherings, restrictions on certain types of activities religious organizations may engage in, etc.

Ukrainian legislation continues to seriously restrict freedom of religion for foreign nationals and stateless individuals. This is manifested in the fact that they cannot found organizations or engage

[1] Prepared by Volodymyr Yavorsky, UHHRU on the basis of a Religious Information Service of Ukraine (RISU) Report prepared as part of the project «Monitoring of religious freedom in Ukraine with particular focus on religious tolerance». The full text of the report is available on the RISU website: http://www.risu.org.ua/text/freedom2006.doc.

[2] «Human Rights in Ukraine – 2004» and «Human Rights in Ukraine – 2005». Kharkiv: Folio, 2005 (and 2006) Available in both Ukrainian and English at: www.helsinki.org.ua. and www.khpg.org.ua

[3] Ukraine's religious network (table of changes, with date for 1 January of the relevant year) // Religious Panorama № 2, 2007. pp. 66-74.

in preaching or other religious activity. These restrictions, moreover, affect people who are permanently resident in Ukraine

Throughout 2006 the local authorities acted in breach of Article 39 of the Constitution by continuing to illegally limit the right to religious gatherings by demanding that permission be obtained to hold them.

Problems remain with exercising the right to alternative military service on the grounds of religious or other convictions.

Among obstructions which religious organizations, as well as individuals, most often encounter in exercising their right to freedom of conscience, one can identify the following:

1) obstacles to registration of a legal entity;

2) difficulties over receiving land for building places of worship, or the return of religious organizations' property expropriated in Soviet times;

3) obstruction of religious activities, public events, the carrying out of social service, in inviting missionaries from abroad, etc.

2. GOVERNMENT POLICY ON FREEDOM OF CONSCIENCE AND RELIGION

Having proclaimed the separation of Church and State, Ukraine has yet to become a secular state in the classic sense. This is first and foremost to be explained by the traditionally strong influence of religious institutions in Ukrainian society, specific features of the national mentality, as well as the historical role of religion in the life of the Ukrainian people. While, according to various sociological surveys, the leaders of the country do not inspire public trust, the Church consistently holds first place in confidence ratings. This difference has on a number of occasions prompted government officials to try to take religious life under their control. One cannot fail to note that the traditions of the State Orthodox Church have remained strong from Tsarist, and in some sense, from Soviet times. This is in places seen in one Church receiving preferential treatment over others and in a political approach to the Church as a part of State ideology.

In 2005, following the Orange Revolution, the new regime carried out a number of measures which were supposed to change State – religious relations, make them more democratic and transparent. In the first instance this involved another kind of relations – more based on partnership and equal, as well as a reduction in State control over religious organizations by abolishing the State Committee on Religious Affairs and creating a less weighty State Department.

In responses to the President's call, inter-denominational councils under the heads of regional state administrations were indeed formed in all regions. Many of them have enabled more open communication between spiritual leaders and the regional administration. On the other hand, within the framework of his policy for uniting the country, the President has on many occasions stressed the need for Orthodox believers to unite in a single Local Ukrainian Orthodox Church. This has not received unequivocal support among believers of different Churches or from secular experts.

During 2006 relations between the State and different faiths underwent certain changes. In the first quarter of 2006 the development of events was to a large extent determined by the parliamentary elections. The outcome of the elections already brought about changes in the government's religious policy. This was in the first instance felt in certain regions, namely eastern and southern regions where the Party of the Regions gained convincing victories in the local elections. There the process began of reinstating the State –religious relations in the form existing up till 2005. In isolated cases religious organizations also attempted to influence choice of personnel at the local level.

Despite certain political crises, there was no division in the policy of the higher echelons of power in 2005. In 2006, however, one could already observe certain differences of opinion in this area between President Yushchenko and representatives of the anti-Crisis coalition.

Viktor Yushchenko's policy can be encapsulated in two principles: 1) real equality in treatment of the various Churches and religious organizations, an interest in cooperating with them and attempt to resolve their problems, etc; 2) particular focus on the formation of a single Local Ukrainian Orthodox Church as a way of uniting Ukrainian society, bearing in mind the specific influence

of the Orthodox Churches in Ukraine. In this the President did not divide religious organizations into «own» and «other», and did not favour any particular denomination. However over recent times he is more and more often to be seen at religious events with the participation of the leaders of the Ukrainian Orthodox Church under the Kyiv Patriarchate [UOC (KP)]. The Head of the President's Secretariat V. Baloha has stated that one of Viktor Yushchenko's priorities is ensuring freedom of religion. The President stresses: «*We can go to different churches, look at different icons and have different political views however national values and interests should unite all Ukrainians*».

As mentioned, at the focus of the President's attention has been the issue of unification of Orthodox believers into a single Local Ukrainian Orthodox Church. The Head of State includes this among matters of national security – as a means of uniting Ukrainian society and as protection against external ideological influences.

«I would like to stress that when we speak of political understanding, this also involves a Local Church», Viktor Yushchenko said in an address to the World Forum of Ukrainians in August 2006 – «*I find it hard to understand how you can talk about spiritual independence of the nation without a Local Church. However I would like to give a very careful answer so that my phrases pulled out of context are not on the pages of opposition papers by evening claiming that the President is trying to lead people to some particular Church. I would like to say that I will respect each person's choice and spiritual path. However speaking from a national position, from the position of the Ukrainian State, for me as an Orthodox believer, it gives pain to see the discord which dominates in the Ukrainian Orthodox Christian Churches in Ukraine. For that reason, during those nights of long discussion of the Memorandum of National Unity, I insisted that this issue needed an answer. And this is not political, but more an answer from you, as a citizen, as a believer, as a parishioner, that you cannot look calmly on such complicated processes in the Ukrainian Church. And this is the subject of Ukrainian mutual understanding.»*[4]

During his official address during the celebrations on Independence Day, he also stated:

«Without interfering in Church affairs, however with faith in historical justice, I know that our people will welcome the creation of a single Local Ukrainian Orthodox Church which will take its place as the roundtable with other Churches and religions.»

At the end of 2006 and beginning of 2007, the President met with the episcopate of both the Ukrainian Orthodox Church under the Moscow Patriarchate [UOC (MP)] and the UOC (KP). He again spoke of his readiness to promote the formation of a special commission with representatives of both Churches to achieve unification. At a meeting with the leaders of UOC (KP), Yushchenko told them that there is at present a group in the President's Secretariat working on promoting dialogue between the two Churches in order to create a single Local Church. The President also stressed that the issue of creating a new culture of relations between the Church and State was of immediate relevance.

This special attention which President Yushchenko pays to Orthodox issues has met with different responses from various religious organizations. It has unqualified support only from the UOC (KP), while UOC (MP) is negative towards it. Most others, however, have either not voiced an opinion publicly, or have expressed a cool attitude, criticism or non-acceptance. On several occasions in the secular milieu, the view has been heard that Ukraine is a secular State and that therefore the President should not concern himself with how to unite Orthodox believers in one Church. The possibility has also been raised of there being a danger of the Orthodox Church becoming a State religion. The President's insistence on upholding his position has led to indignant publications in the Russian media calling on the Head [Predstoyatel] of UOC (MP) to avoid any acts of worship organized by the President's Secretariat with the participation of leaders of other Churches[5].

With regard to the «religious» policy of members of the ruling «anti-Crisis coalition», it is worth noting that before the elections all its representatives associated themselves exclusively with UOC (MP), especially members of the Communist Party and the Party of the Regions. The appointment

[4] The religious issue in the «Memorandum of National Unity» in the RISU burning issue: «New unity or new schism?» // http://www.risu.org.ua/ukr/news/hot_theme/2006/newunion/

[5] UOC MP refuses to take part in joint prayers on Independence Day // http://www.risu.org.ua/ukr/news/article; 11472/

of Viktor Yanukovych Prime Minister aroused unconcealed approval among the leadership of this Church, both in Kyiv[6], and in Moscow[7].

Like the President, the Prime Minister and Speaker of the Verkhovna Rada have held meetings with representatives of the All-Ukrainian Council of Churches and different religious organizations. Viktor Yanukovych instructed the Deputy Prime Minister of Humanitarian Issues Dmytro Tabachnyk restart the Committee attached to the Cabinet of Ministers on the return of property and other possessions of religious organizations. He also instructed the Ministry of Justice when drawing up the draft law «On the fundamental principles of domestic and foreign policy» to set out legal norms to make the spread of propaganda for xenophobia, racism and anti-Semitism impossible.

In his church policy, Viktor Yanukovych has also not left out Orthodox themes. At all elections he has declared himself to be the defender of «canonical Orthodoxy». During his premiership he has also preferred communicating with representatives of UOC MC. The latter associates him with the resolution of many issues, mainly with gaining legal entity status, the return of property and the strengthening of the Church's position at local level. Some of his visits to the regions have been to meet with the clergy of UOC (MP) and to visit its churches. He always takes part in any acts of worship at State level involving the Head of UOC (MP) and tries to avoid any such occasions where this Church does not have official representatives. Incidentally, some Russian media outlets have demanded that he not take part in any religious events around Independence Day involving representatives of Orthodox Churches which do not have canonically recognized status in World Orthodoxy[8].

With regard to the President's idea of State support for unifying movements in Ukrainian Orthodoxy, the Prime Minister stated that «the State should create conditions, however never interfere in the Church's internal affairs», and stressed that he would «carry out the kind of State policy that people, including believers, expect of him». He also said that the State should «create conditions for the development of all denominations, however first and foremost for traditional Churches which include our Ukrainian Orthodox Church».[9]. This statement could not fail to win the approbation of UOC (MP).

Among other members of the government who have spoken out against the President's vision of inter-Orthodox relations is Dmytro Tabachnyk, mentioned above, who condemned any interference by politicians and government officials in internal Church matters. The episcopate of UOC (MP) does not conceal the fact that the Deputy Prime Minister looks favourably and with understanding on their needs. The Head of the Kyiv-Pecherska Lavra Archbishop Pavel hopes that Mr Tabachnyk will help with the transfer of all Lavra buildings which are presently used by the reserve and other structures.

A somewhat strange position with regard to protection of religious freedom has been taken by the Verkhovna Rada and the government coalition. Despite assurances to spiritual leaders of their support, parliament has rejected a number of draft laws of great importance for religious organizations. The Head of the Government also turned down a request from the opposition to reduce payments on communal services for the Church to normal residential rates (as opposed to paying commercial organization rates as at present).[10]

One must in general note that the outcome of the parliamentary and local elections, followed by the formation of the «anti-Crisis» coalition with the election of Viktor Yanukovych Prime Minister, have fostered an increase in revanchist sentiments among certain circles of UOC (MP). In the media outlets which express the views of these circles, the idea has been voiced on many occasions that UOC (MP) needs to have its dominant position in society reinstated. Even the task of the newly-

[6] The Head of UOC MP congratulated the Prime Minister and spoke of its believers' joy. // http://www.risu.org.ua/ukr/news/article;11319/

[7] Alexei II hopes that the new Ukrainian Prime Minister will seek good relations with Russia and will support UOC MP. // http://www.risu.org.ua/ukr/news/article;11312/

[8] Russian Orthodox publicist and missionary against representatives of UOC MP taking part in Ukraine's Independence Day celebrations in St Sophia Cathedral // http://www.risu.org.ua/ukr/news/article;11513/

[9] «V. Yanukovych considers UOC MP «more equal» than the other Churches, for which its journalists were first to congratulate him on his «chancellorship» // http://www.risu.org.ua/freedom/news/article;13702/

[10] Victor Yanukovych did not support the initiative on lowering tariffs on gas for religious organizations» // http://www.risu.org.ua/ukr/news/article;13784/

created government commission on the return of property and possessions previously owned by Churches, was declared to be taking property away from UOC (KP) and other religious organizations which UOC (MP) may consider theirs.

One of the key changes in the structure for relations between the State and religions was in the reinstatement of the State Committee on Matters of Nationalities and Religion.[11]

In the hierarchy of central government bodies, a State Committee comes directly after a Ministry, whereas a State Department is a structural subdivision of the latter. The Resolution envisages higher rank for the body on religious affairs (although the combining of religious and nationality issues raises some well-founded questions). The most important argument given for increasing the powers and raising the status of this government structure was that this would prevent uncoordinated interpretation of legislation at the local level. It would seem, however, expedient to first change the manifestly outdated legislation, and only then monitor its proper implementation. It is for this reason that the most surprising aspect of the decision to reinstate the State Committee is that it came at a time when a new version of the Law «On freedom of conscience and religious organizations» was actively being worked on.

It should be said that in itself the existence of a separate government body on religious matters does not contravene the principles of a democratic society, although practice shows that the more democratic a society, the less powers government bodies have. Most questions are raised by the fact that all this took place without any public discussion or publicity. It is manifestly clear that the implementation of such a system of government bodies has immediate impact on the effective exercising of the right to religious freedom. From experience one can predict that the their current reorganization will at very least not simplify the problem.

The «Anti-Crisis coalition» from the outset tried to push the idea that the State Committee on Religious Affairs needed to be reinstated. The Speaker of the Verkhovna Rada Oleksandr Moroz tried to lobby this at the level of the All-Ukrainian Council of Churches and religious organizations. However, unlike the new basic draft law on freedom of conscience, the idea of State Committee – 2 was not put forward for public debate.[12]. Experts suggest that «the news about the creation of a State Committee on Matters of Nationalities and Religions» [hereafter the State Committee] didn't particularly surprise anybody»[13].

Circles within the Ukrainian Autocephalous Orthodox Church roundly condemned both the reinstatement of the State Committee in general, and in particular the appointment as its head or a member of the Communist Party which is atheist in ideology and which does not conceal its sympathies for the UOC (MP) alone.[14]. Most other faiths have not publicly commented on the new body, believing that this could reflect on the State Committee's attitude to them.

Examples of the authorities' lack of openness in the religious sphere can be seen in the functioning of a group in the President's Secretariat «working on promoting dialogue between the two Churches in order to create a single Local Church», or the department of humanitarian policy under the Cabinet of Ministers which also deals with religious issues.[15]

There have been changes in the relations between Church and authorities at local level. As already mentioned, one of the President's initiatives was the idea of creating inter-denominational councils as consultative bodies under the heads of regional state administrations. By the end of 2005 these councils had basically been created in all regions and had often begun playing a positive role in normalizing Church-State relations in the regions. At the same time, some old conflicts became

[11] Resolution of the Cabinet of Ministers N. 1575 from 8 November 2006. This was a reinstatement, albeit with a broader mandate, of the previous State Committee on Religious Affairs, which had been disbanded in April 2005. In May of that year a State Department on Religious Affairs had been created within the structure of the Ministry of Justice [translator].

[12] Lesya Kovalenko. Expert Opinion: *The State Committee on Religious Affairs has been illicitly reinstated* // http://www.risu.org.ua/ ukr/religion.and.society/comments/article;12791/

[13] Ludmila Fylypovych. Expert Opinion: The Cabinet of Ministers again wants to directly manage religious processes in the country // http://www.risu.org.ua/ukr/religion.and.society/comments/article;12818/

[14] Lviv Regional Brother of the UAOC are outraged by the reinstatement of the State Committee on Religious Affairs and the appointment as its head of a member of the Communist Party // http://www.risu.org.ua/freedom/news/article;13337/

[15] See.: http://www.risu.org.ua/ukr/religion.and.society/analysis/article;10725/

more heated and new ones emerged, firstly on property issues. Not in all cases did the heads of the regional administrations and local councils manage to take a neutral position. The most prominent instigator of conflict was the head of the Rivne Regional Administration V. Chervony whose religious activities even became the focus of attention of a special parliamentary commission.

In 2006, especially after the parliamentary elections, the situation in some regions began to change. The most glaring manifestation of this was the return to favouritism of certain denominations and creations of obstacles for others.

In most regions the practice has remained of meetings between the management of the regional administrations and that of religious associations and organizations active in the regions. At the centre of focus are the already traditional issues regarding the return of property; the allocation of land for building churches; the Church's social service; the introduce of Christian ethics courses, etc.

3. LEGISLATIVE PROVISIONS COVERING FREEDOM OF CONSCIENCE AND RELIGION

In considering trends in the Verkhovna Rada's activities in this sphere one needs first of all to consider the Law «On amendments to some legislative acts on increasing liability for unauthorized seizure of land», adopted by the Verkhovna Rada on 11 January with proposals from the President. Although this law does not formally touch on religious issues, it is in real terms directed against members of the Crimean Tatar Muslim community who are forced to resort to unauthorized occupation of land in order to resolve their social problems. It could, if implemented consistently, lead to a serious escalation of problems both between religions and in the overall situation in the Autonomous Republic of the Crimea.

There were no significant changes in Ukrainian legislation relating to religious freedom and relations between State and Church, although at the beginning of 2006 plans for such were declared. For example, on 20 January 2006 the President issued Decree No. 39/2006 «On the Action Plan Regarding the Performance of Ukraine's Obligations Pursuant to its Membership in the Council of Europe». This instructed the Ministry of Justice to prepare a new version of the Law «On freedom of conscience and religious organizations», as well as a draft law on refining the rules for the return of former Church possessions.

The main task of the working group created by the Ministry of Justice in implementation of the President's demand is to bring current legislation into line with Council of Europe standards and to coordinate the norms of the present law «On freedom of conscience and religious organizations» with the Constitution and Civil Code. Unfortunately human rights groups were not invited to take part in this work. A major achievement of the working group has been to eliminate the discrepancies which had for years been obvious flaws in this law. Positive amendments include, for example, an extended range of those formally covered by the right to freedom of conscience and faith; extension of general legal capacity to religious organizations; a rejection of the classification «quasi-religious», and the transfer of registration function to the Ministry of Justice.

As the basis for classification, the old religious criterion which led to a limited list of possible forms of religious organization (religious community; monastery; mission; brotherhood; seminary; religious association or religious centre) has been discarded. It is replaced by an organizational-legal criterion according to which all the varied forms of religious organizations, regardless of their title, are divided into three forms: religious society, that is, a religious organization created directly by individuals, so to speak, from the grassroots; a religious institution, or religious organization created by another religious organization- a legal entity, regardless of the organizational-legal form of the latter; or a religious association which is made up of religious societies and institutions and is created by religious societies. It is envisaged that religious associations may be at a local or nationwide level, although admittedly this division does not meet international standards. In case of nationwide associations, they must have offices in the majority of Ukraine's administrative territorial units. The working group considers this distinction to be needed in order to later resolve issues around introducing chaplains in the Armed Forces, the criteria for including religious institutions in the All-Ukrainian Council of Churches and religious organizations, etc.

A definite innovation is seen in the granting of legal status to religious associations, and not only to their centres as is set out in the current Law. The very granting of such status to Churches and religious associations makes it possible to resolve the question of restitution for Church property and to establish truly partner relations between the Church and State[16] Of particular importance was the fact that the draft law was put forward for public discussion.

On the other hand the draft retains many features of the Soviet legacy. Two main hangovers can be identified. in spite of the proclaimed shift in focus to the rights of the individual, the latter becomes lost in the structure of the draft law, while despite the attempt to create a new and clear classification and reject detailed regulation of the rights of religious organizations, the draft law has many norms which remain interference in such organizations' internal structures and activities. The draft also fails to regulate the rights of organizations existing without registration.

The Opinion of the Venice Commission[17] states that «In general the draft law can be seen as a liberal and favourable framework for the exercise of freedom of religion. ...Few, though extremely important, issues remain however problematic and should lead to further consideration and improvements in the law, in order for it to meet all requirements of international standards». For example, the norms regulating the system of registration of religious organizations and their status as legal entities need to be clarified to avoid restrictions on the autonomy of a Church and religious freedom. The registration system needs to be simplified, and there is also a recommendation to pay attention to the clarity of wording and concepts in the draft

In 2006, on the commissioning of the Ministry of Justice, a draft law was drawn up under the title «On the principles for returning buildings of worship and property of religious organizations»[18] (made public in the middle of June 2006). This proposes defining at legislative level «the principles for returning buildings of worship and other possessions of religious organizations and their right of succession to property rights» Its aim is defined as being «to overcome the negative consequences of State policy on religion and the Church and to reinstate the rights of religious organizations who owned those buildings and property up until their transfer into State ownership». There have already been attempts in Ukrainian legislation to regulate the return of religious organizations' property.[19]. The fact that these acts were subordinate legislation, and largely declarative in nature, has considerably slowed down the process of restitution. The current law «On freedom of conscience and religious organizations», as well as numerous draft laws with amendments or additions to it, only offer a partial resolution of the problem.[20] The proposed new version of the draft law also has a number of significant shortcomings. For example, it does not define the guiding principles for the process of returning property; there is no definition of key terms in the law; it is not clear how historical heirs to property are to prove their right; there is no mention of the right to appeal against decisions of the authorized agency dealing with restitution, and so forth. Experts therefore speak of the declarative nature of this draft law which in fact has remained a draft «to be ticked off as done» and has not been considered further.

It should be noted that the main task of the legislators with regard to this issue should be to identify clear principles, criteria and mechanisms for transferring property to religious organizations. Without this the provisions of the draft law can be purely declarative intentions and will be open to manipulation both from civil servants and from leaders of religious organizations. It is disturbing

[16] Hennady Druzenko: *Through tradition and freedom* // http://www.risu.org.ua/ukr/religion.and.society/analysis/article;10725/

[17] Available in English at: http://www.helsinki.org.ua/en/index.php?id=1161870929.

[18] Cf..: http://www.risu.org.ua/text/proekt060616_majno.rtf

[19] Resolution of the Verkhovna Rada of the Ukrainian SSR «On the procedure for bringing into force the Law of Ukraine «On freedom of conscience and religious organizations» from 23 April 1991; the Presidential Decree «On measures for returning property connected with worship to religious organizations» № 53 from 22 June1994 and the Presidential Decree «On urgent measures to finally overcome the consequences of the totalitarian policy of the former USSR with regard to religion and the restoration of the violated rights of the Church and religious organizations» from 21 March 2002. These have been analyzed in depth in the article by Hennady Druzenko «Restitution the Ukrainian way: the restoration of historical justice or a trap for the Church?» // http://www.risu.org.ua/freedom/analytics/article;8708/

[20] Lesya Kovalenko. *Analytical assessment of the draft law* «On the principles for returning buildings of worship and property of religious organizations» // http://www.risu.org.ua/ukr/religion.and.society/analysis/article;10493/

that such an important document is still being drawn up without public discussion with representatives of religious organizations, lawyers, economists and international experts.

In 2006 several draft laws pertaining to the land issues of religious organizations were submitted to the Verkhovna Rada and considered.[21]. These envisaged reinstating the right of religious organizations to permanent use of land owned by the State or municipal authorities which they lost in 2001 as a result of the new version of the Land Code coming into effect. The adoption of these legislative amendments were supposed to enable religious organization to enjoy in practice concessions on paying land tax, envisaged in Article 12 § 1,5 of the Law «On payment for land», as well as to carry out their activities in meeting the spiritual and social needs of believers more efficiently. However on 17 October 2006 the Verkhovna Rada rejected both draft laws. Another law was therefore registered on 30 October, this being the eighth since 2003. It was an analogous draft law on amendments to some laws of Ukraine on the right of religious organizations to permanently use land (registration № 2426, was submitted by State Deputies from the BYuT faction R. Lykyanchyk and O. Turchynov, and from the Party of the Regions – Y.M. Sukhy).

Another bill was also tabled by National Deputies O. Bodnar and O. Turchynov on banning the privatization of former places of religious worship» (registration No. 2758 from 15.12.06), however this was rejected by parliament on 11 May 2007[22].

On 25 April 2006 the Minister of Defence A. Hryshchenko issued an instruction on meeting the religious needs of military servicemen and guaranteeing their constitutional right to freedom of conscience. Despite position reactions, it is worrying that this document was never in fact made public. If this means forcing people to follow the religious practices preferred by the head of the military unit, this will categorically not promote the affirmation of religious freedom.

4. PROBLEMS REGISTERING RELIGIOUS ORGANIZATIONS AND IN CANCELLING SUCH REGISTRATION

The need for legal safeguards to ensure that religious organizations can gain legal entity status without any obstruction is set down in many international documents. The right of a religious organization to become a legal entity with all ensuring rights is an element of freedom of association.

The most important principle of Soviet law on religious freedom lay in depriving religious groups of legal entity status and of any possibility of obtaining it.[23]. In 1990, with the adoption of the Soviet law «On freedom of conscience and religious organizations», the latter finally became able to obtain this status.[24]. Since 1991 the issue of legal status of religious organizations in Ukraine has been regulated by the law «On freedom of conscience and religious organizations».

In Ukraine one needs to receive legal entity status in order to engage in virtually any formal religious activities, for renting premises, holding public services or inviting representatives of foreign religious figures, printing and disseminating literature. In order to have military service changed to alternative service, a person must belong to a registered organization included in the list of «organizations whose teachings do not allow the use of weapons».

We thus see that although the legislators set down that a religious community may exist legally without registration or legal entity status, in practice, registration is a necessary stage for a group of believes who wish in any way to practise their faith publicly. Any unregistered community will encounter difficulties in organization religious events, inviting overseas religious figures, arranging alternative (non-military) service etc. Clearly such restrictions are a violation of religious freedom

[21] Draft law on amendments to Article 92 of the Land Code (on the right of religious organizations to permanent use of land) – National Deputy V. Stretovych from 04.07.2006 № 1101 and draft law submitted by O. Turchynov from 04.10.2006 № 2260.

[22] More can be found on this subject in English at: http://www.helsinki.org.ua and www.khpg.org.ua under freedom of conscience.

[23] Text of the Decree of the Council of People's Commissars of the UkrSSR: Separation of the State and schools from the Church», edited by Kh. Cherlyunchakevych, Kharkiv 1926, pp. 5-6

[24] It should also be stressed that the relevant amendments were introduced to the civil legislation of the Union and of the Republics: Article 11. The fundamental principles of civil legislation of the USSR and its Republics from 31 May 1991 // № 2211-1, Vedomosti SSSR (1991), v. 26, p. 733.

since the right to organize religious services, study and teach religion, publicize ones own beliefs and other activities have a direct impact on the human right to freedom of religion and should not be contingent upon the legal status of an organization. It is important to stress that for some religious groups it is extremely important to have the possibility of not registering since the lack of any contact with the state authorities is a part of their teaching. This, for example, is the case with Jehovah's Witnesses (of whom at the beginning of 2005 there were 626 registered and 345 unregistered congregations), as well as some groups of followers of certain eastern religions, some pagan teachings and certain Protestant congregations. In addition this is the possibility to legally exist for religious groups who, for varying reasons, have less than 10 members.

It should be noted that since the law lacks any clear norms regarding the activities of unregistered religious groups (even notification of their existence is not required), cases of abuse of this status have been recorded. For example, we are aware of cases where unregistered religious congregations rent premises for religious activities from state or educational institutions which in Ukraine is prohibited by law. The activities of such groups are also virtually not subject to monitoring.

It has become customary for the Kyiv City State Administration's Department on Religious Affairs to unlawfully and unwarrantedly demand that in submitting their charters for State registration, religious communities specify in their name affiliation with a particular Kyiv district. This effectively restricts the community's activities to that given district. These demands from officials can be deemed interference in the activity of religious organizations, since the law «On freedom of conscience and religious organizations» does not envisage State registration of religious organizations' charters at the city district level. There have also been flagrant infringements through refusing to register the charters of several religious communities who were not prepared to make such changes to their name (for example, the religious congregation «Church of Evangelical Christians «City on the Hill»[25].

Certain problems arise over registration or re-registration in cases where there is internal conflict in a congregation or in the eparchy. Such conflicts are frequently over property, and the moment of registration is used to keep it for a particular denomination. This was the case with one UOC (MP) congregation in the Odessa region which came into conflict with the local eparchy management over the congregation's church and therefore decided to transfer to the jurisdiction of the UOC (KP). However in the regional department on religious affairs (not without influence from the eparchy management), the congregation's charter was not re-registered, but registered as a new charter, not cancelling from the registered the charter of the congregation of the UOC (MP). In this way a precedent was created that a congregation which was building a church could lose it, as happened in 2006.

As became known from the Zhytomyr Regional Administration, indifference from the management of the Ovrutsk-Korostenka eparchy and metropolitan office of the UOC (MP) to whether one Orthodox monastery and a convent in Cholovychi (Malynsk district) gain legal entity status is leading to numerous misunderstandings in the activities of these religious organizations. Both monastery and convent lack legal entity status, but the convent has presented employees of the regional administration with the charter of the religious congregation of the Ukrainian Orthodox Church of the Blessed Metropolitan of Kyiv Mykhailo, the activity of which covers Kyiv, which is not entirely in keeping with the monk way of life and the place where it is located. In future this situation could complete financial and economic activities and there could be problems in registering the right to construct buildings of worship. For this reason, the settlement council of Cholovychi, and the Malynsk district administration have on a number of occasions asked the believers to gain legal status for both monasteries. Bearing in mind that both men and women's are on the territory of the Ovrutsk-Korostenka eparchy of the UOC (MP), the district administration addressed a request to the Archbishop Vissaryon to support the registration of the monasteries. They received no response.

The Donetsk – Kharkiv exarchate of the Ukrainian Greek Catholic Church [UGCC] report that a UGCC congregation in Kryvy Rih (Dnipropetrovsk region) encountered problems in registering as a religious organization.

[25] *Maxim Vasin: Realities of religious freedom in Ukraine: facts from 2006* // http://www.risu.org.ua/eng/religion.and.society/analysis/article;14799/

Deputies from the Lviv Regional Council proposed taking the religious organizations Jehovah's Witnesses off the register on the grounds that by its activities it offended some Christian believers. The relevant appeal was sent to the Verkhovna Rada. We would, however, note that this decision had no legal grounds nor legal consequences.

For several years the Unification Church (founded by the South Korean Sun Myung Moon) has not been able to gain legal registration as a religious organization.

Mormons have the same problem with religious organizations in some regions encountering obstructions over registration.

Another world-known organization, Scientologists would like to receive official legal status. At present they engage in widespread unofficial activities in Ukraine, partly presenting this as human-rights related. Their official registration has been opposed by a lot of Ukrainian Churches and religious organizations (certainly not all officially), who consider Scientologists' activities to be especially dangerous for the public.

The Greek Catholic congregation of Christ the King in Luhansk has experienced pressure from the local authorities. They have had applications for land to build a church turned down and have not been permitted to hold public events. Then recently the Department for fighting organized crime has taken an interest in the financial state of the congregation. Greek Catholic believers are convinced that a campaign against their Church and persecution of dissident thinkers are being waged in the Luhansk region.

In January 2005 the congregation discovered that their legal registration had been withdrawn by a court ruling on the grounds that they were not registered with the tax inspectorate. The congregation was, moreover, not informed of the court hearings and only learned of the ruling by chance. They turned to the courts and succeeded in having their legal status reinstated. Foreseeing that this would not be the end of the «interest» which the local authorities were taking in the Luhansk Greek Catholic congregation, they appealed to human rights organizations and the media to defend freedom of conscience, the Constitution and the equality of all before the law.

5. PROPERTY AND LAND ISSUES

In this area one can identify the following problems:

- obstruction in building places of worship – this is seen mainly in cases where a congregation has in some way actually received land but cannot settle on it or cannot complete already started construction;
- obstruction in renting premises – this is largely a problem encountered by Protestant congregations who cannot or do not want to build their own premises and therefore rent them for their own religious purposes from State or municipal authorities. The problems they encounter mainly arise when concluding lease agreements or in extending these;
- delays or reluctance to return religious organizations property or other possessions once used for religious purposes, conflict with the institutions which now own them. This applies in many cases to Roman Catholics, Orthodox and some Protestants.
- inter-denominational conflicts over churches arise due to lack of coordination over alternate use or transfer by the State of certain property to one Church where another has claims to it. These are normally between different Orthodox Churches or in some western regions between Greek Catholics and Orthodox believers;
- attempts to take away (by returning to State or municipal property) land or other possessions from religious organizations which already belongs to them. There are not many such cases. The property may be of interest to businesses due to a good location or high commercial value.

An analysis of appeals to the Human Rights Ombudsperson shows that almost 60% concern the problem of shortage of premises for religious services. This problem is partly resolved through handing the place of worship to two or more religious organizations to use in turns, as per Article 17 of the Law «On freedom of conscience and religious organizations». Unfortunately, in many cases this provokes conflict situations between religious congregations from different denominations. Argu-

ments over the right to possess or use religious buildings and other property are most heated in the Transcarpathian, Chernihiv, Rivne and Lviv regions.

Since property and land issues are usually within the jurisdiction of the local authorities, this creates the right conditions for abuse and discrimination which is a manifestation of intolerance. In order to partially resolve this problem, the issue of legislative regulation over the return of places of worship and other property to religious organizations must be placed on the agenda.

CASES WHERE RELIGIOUS ORGANIZATIONS' RIGHT TO LAND AND OTHER PROPERTY WERE VIOLATED

In many cases the Bailiffs' Service has not managed to enforce court rulings in property disputes. Several dozen rulings in the Lviv region along have not been enforced. Religious congregations sometimes therefore choose to seize churches.

Deputies of the Lutsk City Council voted to let a piece of land at 5 Karpendko-Kary St to the limited liability company «Femida-Inter» in order to create a car-washing complex. The said address is however also the legal and actual location of the UGCC St. Basil the Great Chapel and a connected monastery which has been under construction there for over ten years. As a result of the City Council's decision, «Femida-Inter» legally received the right to the land site with the monastery buildings on it.

The longstanding problem over allocating a site for the construction of the eparchy cathedral of the UOC (MP) in Lviv remains unresolved. The eparchy of the UOC (KP) which does not have a cathedral or building for the eparchy administration is complaining about the local authorities. The land in the city centre which UOC (KP) had asked for was not given to them. Instead, some time later a Mormon Church appeared on the site. No less acrimonious has been the situation over the eparchy administration and seminary of the UAOC who are demanding that the city return them a complex which is at the present time a college. From their side, the city deputies noted that a process is underway in the city of seizures by religious congregations of land, mainly in park areas where unlawful buildings of worship are being constructed. These comments have been made in relation effectively to all the main denominations in the city.

For over ten years the Muslim community in Lviv has been trying to receive land for construction. The sites which they have been offered by the city authorities are not suitable for geological or other reasons.

The problems over land and property are at a dangerous level in the Crimea. At the beginning of October 2006, the Crimean prosecutor's office sent a letter to the leaders of the autonomous republic in which it acknowledged that «the lack of resolution on the transfer of religious buildings to religious congregations and provision of land sites for them to build places of worship remain a destabilizing element in the relations between the State and religious organizations and grounds for inter-denominational conflict.»

The prosecutor's office identified numerous violations by the local authorities and bodies of local self-government in the Crimea who do not even have a system for registering religious organizations and buildings of worship in their possession or exploitation. For example, up till now bodies of local self-government have not taken the measures set out in the Presidential Decree «On urgent measures to finally overcome the consequences of the totalitarian policy of the former USSR with regard to religion and the restoration of the violated rights of the Church and religious organizations», with regard to returning former buildings of worship to religious organizations. At the present time in the Crimea there are 26 such buildings of which 9 are State-owned and the others municipal property.

The prosecutor's office has published the following flagrant examples of disregard for the rights of religious communities to have buildings of worship returned.

A decision of the Alushtyn City Council unlawfully leased a former synagogue to a limited liability company for 10 years despite a well-founded claim having been made on it by the religious community «Menora».

Dissatisfaction and tension in inter-denominational relations have been aroused by the failure to take action on transferring the Mosque «Khan-Jami» to a Muslim community. The territory of this complex is in the use of a military unit which is letting it to commercial outfits.

Cases have been established where the local authorities took decisions to take buildings of worship away from religious organizations and communities. In August 2006 the Executive Committee of the Yalta City Council passed a decision to transfer a Lutheran church building to the municipal enterprise «Yalta housing exploitation». The officials were not even stopped by the resolution of the Crimean Council of Ministers, adopted fourteen years earlier, which handed this building over for the free use by the Lutheran community in Yalta!

On the basis of a decision by the Zemlyanychna Village Council in the Bilohirsk district in 2005 8 individuals were permitted to privatize land in the village of Uchebne, within territory provided in accordance with a State act with the right of permanent use to the Tolpovsky Svyato-Paraskevivsky Women's Monastery.

The lack of a place of worship and the unwillingness of the local authorities to provide the UOC Kyiv Patriarchate with land provoked conflict at an inter-denominational level in Yevpatoriya. This resulted in a public religious service attended by more than 80 people being held at an intersection.

Given the lack of proper control from the local councils of the Feodosiya and Yalta regions, and the Krasnoperekolsky, Kirovsky, Leninsky, Pervomaisky, Dzhankoisky and Chervonohvardiysky districts of the city of Kerch, individual religious organizations are infringing land and city construction legislation – only half of them have the right and statute documents for the land.

Cases have been established where construction was carried out without plans or documents for the land, and with no building permit. It transpired that just in Feodosiya region 10 religious communities have not seen the need to formalize documentation. Of 9 religious organizations in the Kirovsk district who are constructing buildings for worship, not one had approached the Kirovsk architecture and construction office for building permits.

In all according to the results of the prosecutor's check 10 protests against unlawful decisions by local councils were made, as well as 17 submissions and instructions on removing infringements of the law. In addition 12 resolutions were passed to institute administrative proceedings and 4 to begin disciplinary proceedings.[26]

The Simferopol City Council refused to return the former Lutheran church to the Lutheran community despite serious legal grounds. This church which had been closed by the Soviet authorities in 1926 was leased out by the Simferopol Mayor's office for construction of a private sports club.

In 2006 there were a fair number of conflicts between religious congregations of different denominations over church buildings. The most prominent of these were in the Rivne region, Chernihiv and Bukovyna.

In Chernihiv there was a serious conflict between Orthodox congregations over St Kateryna [Catherine] Church which is the main attraction of the city. The conflict could be called the most prominent in 2006. Back in 2005 the Head of the Regional Administration had promised to hand this Cossack church which belongs to the historical and architectural reserve for use to the «Cossack congregation» of UOC (KP). When the museum staff had basically prepared the premises to be handed over, on 5 May 2006, the Head of the Chernihiv Regional Administration Mykola Lavryk, on the basis of the President's Decree on transferring places of worship to believers, issued an instruction «On handing over St. Kateryna Church for the use of the religious congregation of the UOC (KP) of the city of Chernihiv.»

In reaction to this, believers from the UOC (MP) came out in protest and were supported by fellow believers from other regions. The conflict was particularly heightened and politicized by members of the Union of Orthodox Citizens, the organization «Proryv» [«Breakthrough»], the Progressive Socialist Party of Ukraine (including people arriving from other cities) who organized a blockade of the Church, not allowing museum staff near it. In this situation, the police did not

[26] The Crimean Prosecutor's Office: the Crimean authorities are creating the grounds for conflict by refusing to resolve the land problems of religious communities // http://www.risu.org.ua/freedom/news/article;12387/

fulfil their duty with regard to protecting State property and enforcing decisions of the Head of the Regional Administration, and began effectively serving as the picketers' guard.

In a ruling from 12 July 2006, the Chernihiv Economic Court suspended the force of the Head of the Regional Administration's Resolution handing the church over to believers of UOC (KP). In July and August 2006 court hearings continued into several claims lodged over the church. On 2 August the Chernihiv Economic Court heard a claim brought by the Chernihiv eparchy of the UOC (MP) and the Green Party against the Chernihiv City Council over the latter's decision to not hand St. Kateryna's to the UOC (MP). This was already the second hearing; the first took place on 26 July, however the court deferred the hearing since the respondent's representative refused to accept the claim as lawful, while the representatives of the UOC (KP) demanded that the Orthodox congregation who was supposed to receive the church be brought into the proceedings. The court once again chose to defer the hearings, this time over a counter claim from National Deputy Mykola Rudkovsky, who lodged a claim against the decision of the Head of the Chernihiv Regional Administration Mykola Lavryk to hand the church over for use to the UOC (KP). It became known that the court was planning to combine both claims. Meanwhile, yet another civil claim emerged in the scandal around St. Kateryna Church. The directorate of the Museum of decorative art which is in the church building lodged their suit against the picketers who, as the claim read «prevent the museum staff from working». The court rejected M. Rudkovsky's claim, however it had still not issued a final ruling regarding the fate of the church by the end of the year.

On 5 September there was a clash near the church between members of the Youth National Congress who were planning to remove the blockade and supporters of UOC (MP), mainly members of the Progressive-Socialist Party [PSPU] and the Union of Orthodox Citizens of Ukraine [UOCU] who, with the support of special units «Berkut» and «Gryphon» did not allow the young people near the church. They were all taken to the city police station and then released after a few hours.

At the beginning of the 2007 the picket held by representatives of the Chernihiv eparchy of the UOC (MP), together with the PSPU and UOCU, near St Kateryna Church was continuing. They have illegally connected themselves to the electricity network and have erected a tent city near the architectural monument. They are being guarded by members of the police. The eparchy of the UOC (KP) also decided to set up their tents however this came up against brutal behaviour from the opposing party.

No decision, whether from the court or from the authorities, will lead to a peaceful resolution of the problem since representatives of the UOC (MP) are not prepared to cede any church to the UOC (KP), and are even demanding that they get the next buildings. The Head of the Chernihiv Regional Administration is no longer insisting that his decision be enforced. The situation would appear a stalemate if the authorities do not enforce their decisions and the police do not fulfil their direct duties.

After over a year's confrontation, the High Administration Court has returned an UOC (MP) congregation the Svyato-Troitsky Church in the village of Rokhmaniv in the Ternopil area. In 2005 the congregation split up, with some transferring to the jurisdiction of the UOC (KP). They also raised the issue of taking turns in using the church, with this being supported by the Ternopil Regional Administration and the local court. The latter revoked an old ruling which had handed the only church in the village into the possession of the UOC (MP) congregation. Due to the fact that members of the UOC (MP) refused to take turns, they were totally stopped from using the church. For over a year this conflict has been raging. On 31 August a hearing was held of the High Administration Court which revoked the instruction of the Head of the Ternopil Regional Administration on using the church in turn, and reinstated the rights of the congregation of the UOC (MP) to the church. In response to this decision, the congregation of the UOC (KP) lodged a complaint with the Supreme Court which suspended enforcement of that ruling.

The Lviv Roman Catholic Church complain that, in breach of a court ruling, the authorities of the town of Khyriv in the Lviv region are not returning the church building to the Roman Catholic congregation.

The Muslim community in Dnipropetrovsk has for not the first decade already been demanding the return of the mosque built by their predecessors before the First World War. During Soviet times

the mosque was not used as such. At present it holds a children's sport school and quite a number of commercial enterprises. The city authorities are turning down the demands on the grounds that the mosque building was destroyed during the War and the new building was erected using city money. The Muslims have documents which maintain that in fact the mosque was not fully destroyed, and that there were only other buildings added to it (with an area of over 1000 square metres) which the Muslims are making no claim to and suggest that they be left to the sport school. Instead the city's Muslims are forced to use premises not suited for their religious purposes.

In 2006 several situations arose where residents of micro-districts came out against plans to build places of worship in their district. A telling example of this was a case in the centre of Kyiv when the fate of the church was determined at public hearings. On 19 October in the Shevchenkivsky district of Kyiv, at the intersection of O. Honchar St and B. Khmelnytsky St (in Zoya Kosmodemyanska Square) public hearings took place over a building permit in that place for an Orthodox church. The hearings brought residents of the micro-district, deputies of the district council and parishioners of the St Volodymyr Church located in the premises of Hospital No. 18. Supporters and opponents of the planned church gathered in separate groups near each other. The atmosphere became more and more fraught, with heated clashes breaking out from time to time between the two camps. Not long before the official beginning of the public hearings, Father Andriy Mykalyk (of the UOC (MP)), who is in fact the initiator of the church construction arrived. He addressed those present through a loudspeaker asserting the lawfulness and need to build the church. «The Orthodox community has both a moral and legal right to build a church in Zoya Kosmodemyanska Square. In accordance with the decision of the Kyiv Council № 373/2948 from 21 April 2005 land was allocated for the construction. On 21 January 2006 the department of the State architectural and construction inspectorate in Kyiv issued a building permit for work № 1812-Shv/S. The final site for the building of the church was determined as at the intersection of O. Honchar St and B. Khmelnytsky St which was provided instead of the previously assigned site on the corner of O. Honchar and M. Kotsubynsky St.», he said. The Deputy Head of the Shevchenkivsky district administration in Kyiv M. P. Nedashkivsky also came to the hearings and called for a beginning of dialogue. However the given initiative basically failed since the parties were not ready to seek compromise.

6. THE RIGHT OF PEACEFUL RELIGIOUS GATHERINGS

The Law on freedom of conscience and religious organizations, in breach of Article 39 of the Constitution, establishes a permit-based procedure for holding mass religious events.

In practice public religious gatherings confront an even greater number of problems linked with discrimination, intolerance or an arbitrary interpretation of legislation.

On 12 January 2007 the Kharkiv – Poltava eparchy of the Ukrainian Autocephalous Orthodox Church learned that the Kharkiv City Executive Committee had turned down their application (submitted on 28 December 2006) for priests of the UAOC to bless the water on 19 January, on the day of the Baptism of our Lord [Khreshchennya Hospodnye] in one of the springs at Sadzhyny Yar. After the conflict gained wide publicity the ban was removed.

The Mayor of Irpin in the Kyiv region banned the Baptist religious community «Biblical Church» from holding s summer children's camp. «I prohibit the holding of events with children in religious communities», was the verdict of Myroslava Svystovych, Mayor of Irpin when asked to give permission for the local House of Culture to be used for holding several one-day children's camps. According to the programme for the event, the children were to take part in handicraft and singing groups, put on theatrical performances and various forms of entertainment, study Biblical stories and take part in sports competitions. They had previously been refused permission by the Deputy Mayor on humanitarian issues Petro Lyaskovsky. His grounds were as follows: 1) he maintained that such churches as «Biblical Church» divide Ukraine and that therefore we have not been able to build our State; 2) he accused the community of campaigning for adults and children to join their Church and forcing them to pay a «tenth» tithe; 3) he stated that the community was not a church but a sect which was involved in making people into zombies. He believed that there

should only be a Ukrainian Orthodox Church, and that proselytizing to other denominations was unpatriotic. He also threatened that if the community still attempted to work with children (meaning studying Biblical stories and singing Christian songs), then they would be held liable before the law. The community believes that the officials were led by their emotions and that their statements had not been thought out. As became known, the conflict was resolved.

In the settlement of Ivanivka in the Luhansk region, on being informed that the local Protestant community planned to hold a concert of Christian songs near the settlement club, the local authorities reacted negatively, prohibiting «any activities of totalitarian sects on the territory of the Ivanivka Settlement Council». This wording is contained in the official decision of the fifth session of the post-election Ivanivka Settlement Council «On prohibiting totalitarian activities on the territory of the Ivanivka Settlement Council» № 5/12 from 22.08.2006. Despite the support of settlement residents for the concert of Christian songs, the representatives of the local authorities and particular individuals succeeded in twice disrupting the event, stopping the equipment from working and hurling abuse at the believers. They used the decision of the settlement council as justification for their actions. Moreover, representatives of the law enforcement agencies who came at the request of the concert organizers to ensure public order did not use any measures against people who were trying to disrupt the concert and provoke a fight. Members of the Protestant community approached the Luhansk Region Prosecutor Y.V. Udartsov over the violation of their constitutional rights. They called on the Prosecutor to defend their legitimate interests and to make a protest against the decision of the Ivanivka Settlement Council № 5/12 from 22.08.2006. The response of the Prosecutor to this appeal is not known.

7. THE RIGHT TO RELIGIOUS UPBRINGING AND EDUCATION

On 9 March 2006 the Ministry of Education moved from its traditional position and at a session of the State Accreditation Commission officially recognized theology as an academic discipline. This placed theology students on an equal footing with other students, for example, with regard to deferment of military service, concessionary fares on public transport, etc. In the light of this decision, on 4 April 2006 the Verkhovna Rada adopted amendments to the Law on military duty and service which allowed for deferment from being called up or from military training sessions, for day students of theological faculties, as well as their graduates who have taken religious orders. However being included in the register is only the first step towards exercising the declared rights. Heads of such institutes now face licensing and accreditation issues, while graduates of previous years need to have their degrees recognized.

On the other hand, the lack of consistency of the authorities with regard to guarantees of religious rights in education can be seen in the attitude to the draft law on giving religious organizations the right to found general education institutions at different levels (the author was V. Stretovych, register № 2020 from 30.08.06). Despite the sense and justification of the proposals, as well as the support of the All-Ukrainian Council of Churches and Religious Organizations, in November 2006 the draft law was rejected, both by the profile committee and by the Verkhovna Rada. One of the conceptual failings of the draft law was deemed to be that «it does not give a clear answer to the question what type (secular or religious) will be the educational institutions founded by religious organizations».

The introduction of a subject «The Foundations of Christian Ethics» (or «Religious ethics») was more actively discussed in the first half of 2006. in 2005 those initiating such a course gained the support of President Yushchenko. The issue was brought to a nationwide level and actively discussed in the media. The Ministry of Education and Science spoke out against the introduction of such a course.

In June 2006 the same Ministry proposed another new concept for teaching moral and ethical subjects at school.[27]. However this concept aroused a wave of indignation among representatives of

[27] On the conceptual principles for studying subjects with a spiritual and moral focus in general educational institutions // Decision of a panel of the Ministry of Education and Science from 28 June 2006, Protocol № 8/1-2.

several leading Christian churches. The latter approached both the President and the Ministry of Education on this matter however this gave no result.

Certain experiments in introducing subjects with a spiritual and moral focus in the system of general secondary education have been tried out in the Lviv, Ternopil, Ivano-Frankivsk, Rivne and other regions. Subjects with a spiritual theme like «Christian Ethics», «Christian Culture», «Foundations of the Orthodox Culture of the Crimea», «Foundations of the Muslim culture of the Crimea», etc, are studied in a quarter of such general educational institutions. In general in various regions of the country, subjects of Christian ethics and other subjects with a spiritual and moral focus are being introduced with varying degrees of interest from parents, students and the public, as well as different levels of depth and quality in teaching the subjects and training staff.

According to the standard curricula for 12-year schools approved by the Ministry of Education and Science, as well as the relative letters of the Ministry, the study is envisaged in the fifth and sixth grades of general educational institutions, beginning from 1 September 2005, at the choice of students' parents, the subject «Ethics», or (/as well as) subjects with a spiritual and moral focus to the number of hours allowed for the study in the fifth and sixth grades of the subject of «Ethics». From 2006 the conceptual principles envisage that students in the fifth and sixth grades study «Ethics», Foundations of Christian ethics», «Foundations of religious ethics». The choice of one of these is made on the basis of a written application from parents or those replacing parents, bearing in mind the opinion of the student him or herself.

However experts note a certain decrease in the number of students studying Christian ethics.

This is the case, for example, in the Chernihiv region. «The number of students studying Christian and religious ethics in general education schools in Chernihiv, compared with last year, has almost halved», the head of the department of education of the Chernihiv City Council Mykhailo Ruban stated. In 2005 new courses «Foundations of Christian Ethics» and «Foundations of Religious Ethics» were taught in 23 schools of this regional centre, while in 2006 only in 11. Last year there were 738 children studying these courses, this year only 400, although there is interest, both from school students and from their parents. Mykhailo Ruban attributes this reduction to a shortage of specialists. He says that only teachers who have undergone special training have the right to teach on these courses not linked to any particular faith. This should be dealt with by the Institute of Postgraduate Education however the latter is not managing to provide for demand. In addition, the requirements for teaching Christian and general religious ethics are fairly high. As well as a base humanitarian education and general level of erudition, they need high moral qualities. After all, the lessons touch on such universal human values as conscience, good, beauty, love, piety, honour, compassion and duty. «Neither course is linked with religious ritual», Mykhailo Ruban stresses – «The material for the classes on Christian ethics are the best attainments of Christian culture and both Ukrainian and world philosophy. The course «Foundations of Religious Ethics» is based on the moral principles of world religions. Its aim is to develop tolerance and the ability to co-exist in a multi-faith environment». Students begin attending such courses with the written consent of their parents. Priests and other formal religious figures are not invited to teach such courses in Chernihiv region schools. At the present stage the department of education of the Chernihiv City Council is proposing to introduce courses to train specialists on a distance learning basis, and that school students speak with priests in churches, not at school.

8. POLITICAL ACTIVITIES ENGAGED IN BY RELIGIOUS ORGANIZATIONS

The involvement of religious organizations (forced or voluntary) in political activities is one of the forms of exploiting their public influence for political purposes. Effectively, not one electoral campaign in Ukraine during the years of independence has passed without the involvement of religious figures. This can be seen in use of the altar for political campaigning, clergy on candidate lists, and most often both of these forms together.

The Presidential elections in 2004 demonstrated the worst forms of Church involvement in dirty campaigning but also provided an example of the possibilities for joint participation of different Churches and religious organizations in defending the values of civic society.

In comparison with 2004, there was less involvement of the clergy in the 2006 parliamentary and local elections. The elections were for the first time under a new proportional representation system. There were 10 priests or other religious figures on the parliamentary candidate lists from various parties and political blocs (according to information from the Central Election Commission[28]), which is not, after all, prohibited by law. On the other hand, the candidate lists for different levels of local councils contained a fair number of religious figures. This resulted in many of them being elected to different councils. Perhaps a record was set by priests from the Khmelnytsky eparchy of the UOC (KP) which, headed by their Bishop, took up 15 positions in various councils. The strongest reaction from the mass media was elicited by the fact that the candidate list for the Party of the Regions in the Odessa regional council was headed by the local Metropolitan of the UOC (MP) Ahafangel (he has always been interested in politics, was actively involved in the 2004 elections, and he began his deputy activities back in Soviet times).

Of course, it is difficult to imagine that participation by representatives of different Churches and religious organizations in the elections (this being their legal right as citizens) could go ahead without violations of current legislation which prohibits the Church from engaging in political activities. Understanding the complexity of the problem, many Churches have issued public statements prohibiting their clergy from taking part in elections to the Verkhovna Rada, and the Ukrainian Greek Catholic Church strictly forbids its priests from taking part in elections at any level at all.[29]

In order to prevent religious life becoming politicized, following an initiative from President Yushchenko, on 3 March 2006, at a meeting with the President members of the All-Ukrainian Council of Churches and Religious Organizations signed a declaration prohibiting the use of the authority of Churches and religious organizations in pre-election campaigning.[30]

Linked with those elections was one other religious-political theme which was periodically discussed on a wide scale by the media during 2006. This was the victory in the elections of Kyiv Mayor Leonid Chernovetsky, member of the charismatic religious organization «Assembly of God» which is led by the well-known preacher Sunday Adeladja and which helped him to win. Later critical comments about Chernovetsky's activities have almost always been of a religious nature and have bordered on the limits of religious tolerance.

Most politically active among religious organizations are some new Protestant organizations. Particularly prominent are communities forming part of the association «New Generation» (created at the beginning of 2007), whose leader is a pastor from Latvia Oleksy Lyedyaev, author of teachings about a «New world order».

It has already become standard before elections that political parties and blocs introduce a religious element to their programme material, using religious terminology for the sake of its effect on voters, most of whom are believers. Following the elections, however, it is also equally traditional that promises to defend and stand up for the interests of the Church are forgotten. This, for example, is demonstrated by the voting on draft laws pertaining to religious life, allocation of land for building places of worship (with this especially noticeable at local council level) or the return of former religious property, and even in support for those draft laws which are advantageous for their «favoured» denominations.

In the post-2006 Verkhovna Rada, as in previous terms, there were lobbies for certain Churches. This time the most overtly expressed lobby was that for the UOC (MP). As already mentioned, all three parties of the governing coalition identify themselves with support of this Church. At the same time, in the profile committee on spiritual issues members of the opposition dominate and they are inclined to support the so-called pro-national Churches.[31] This can lead to speculation on the religious card in the political struggle both at the Verkhovna Rada level and other bodies of power.

[28] Official website of the Central Election Commission. // http://www.cvk.gov.ua/pls/vnd2006/W6P001

[29] Priests of the UGCC do not have the right to take part in the elections, or to be involved in financial operations // http://www.risu.org.ua/ukr/news/article;8775/

[30] The President has had meetings with members of the All-Ukrainian Council of Churches and Religious Organizations // http://www.risu.org.ua/ukr/news/article;9354/; Yury Reshetnikov, 2006: Religious Dimension // http://www.risu.org.ua/ukr/religion.and.society/analysis/article;13957/

[31] More detail in: Yury Reshetnikov: Look who's come! Religious and denominational sympathies of Verkhovna Rada Deputies, 2006. // http://www.risu.org.ua/ukr/religion.and.society/analysis/article;11233/

In 2006 it was possible to further observe the process of politicization of religious life reflected in the interference by certain political forces (for example the Progressive Socialist Party) in inter-denominational confrontations; the participation of church-linked civic organizations (which identify themselves as speaking on behalf of a particular church group) in political actions (protests against NATO, pro-Western policy, for closer ties with Russia, in support of the Russian language as a second State language – this being one of the main spheres of activity of the Union of Orthodox Citizens of Ukraine).

As examples one can cite the conflicts over churches in the Rivne region and in Chernihiv. In both cases the side of UOC (MP) has been actively supported by the Progressive Socialist Party which also presented itself at the elections as the defender of this Church and was in a bloc with civic organizations which identify itself with the same Church (for example, the Union of Orthodox Citizens of Ukraine). The actions of representatives of PSPU were overtly intolerant and aimed at provocation with respect to the opposite site (UOC (KP).

One can say that overall there has been a reduction in political activeness of religious organizations when compared with 2004 and 2005. This is explained, among other things, by the ineffectiveness of political propaganda in churches, as well as by the fact that there is [or seemed to be in 2006 – translator] a fairly large amount of time before the next elections, and therefore possibility the political parties have lost interest in religion. However, the latest political crisis could change all of this, and if elections are again on the horizon, then religious organizations could be pulled into the maelstrom of political technologies.

9. REJECTION OF IDENTIFICATION NUMBERS OF RELIGIOUS GROUNDS[32]

The State Tax Administration [STA] has regulated how identification numbers are received by tax payers who had previously rejected them on the grounds of their religious convictions. This was the substance of an STA Order from 6 July 2006, registered with the Ministry of Justice on 3 August. The document states that a person who on the grounds of religious or other convictions refused to have an identification number, and after some time changed his/her decision, may approach an STA office at their place of registration and ask to receive such a number (repeat allocation of number). Procedure is also envisaged for adding a note to a person's passport about the possibility of carrying out operations without an identification number when changing passports.[33]

10. RELIGIOUS INTOLERANCE AND INCITEMENT TO ENMITY BETWEEN DIFFERENT RELIGIONS

THE OVERALL LEVEL OF RELIGIOUS TOLERANCE

The most adequate legal mechanism for ensuring an atmosphere of tolerance in society lies in negative legal regulation, that is, the prohibition of discrimination, and specifically «any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis»[34]. However the principle of tolerance and prohibition of

[32] Much more detail can be found about the original controversy over identification numbers in *Human Rights in Ukraine – 2005* (in the analogous section): http://khpg.org/en/index.php?id=1151768398 The passport mentioned here is the «internal passport or document each Ukrainian has, whereas those wishing to travel abroad obtain a separate passport for this purpose (*translator*)»,

[33] Order of the STA and MIA «On approving amendments to the Procedure for adding a note to the passport of a Ukrainian citizen regarding the identification number of an individual paying tax and other compulsory payments» (6 July 2006 № 386-663) // http://www.risu.org.ua/ukr/resourses/govermentsdoc/order_sta_060706/

[34] UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Resolution № 36/55 from 25 November1981).

discrimination on religious grounds are not clearly enough regulated by legislation thus preventing the legal remedies from being fully effective.

Although the legislators clearly prohibit religious organizations from interfering in the activities of other organizations, in any way propagating enmity and intolerance to believers of other faiths or to non-believers, as well as insisting that teachers of religion and preachers must guide their audience in a spirit of tolerance and respect, there is no mechanism for exercising these bans and requirements.

Legislation stipulates criminal liability for «deliberate acts aimed at inciting ethnic, racial or religious antagonism» (Article 161 of the Criminal Code), «for damaging religious buildings and others linked with religious practice» (Article 178), «for unlawfully holding, desecrating or destroying religious sacred objects» (Article 179) and «for causing obstruction to religious rites» (Article 180). In fact, however, to a large extent due to the shortcomings of these norms, virtually no one has been convicted under these articles.

A glaring example of religious intolerance was provided in 2006 by some Deputies of the Verkhovna Rada. During addresses on draft laws pertaining to religion, a number of National Deputies made speeches with overt elements of intolerance. Most known for this can be said to be National Deputy from the Party of the Regions Yury Boldyryev who has on many occasions in parliament divided religious organizations into «ours» (here he generally puts UOC (MP) and seldom any others) and «alien» or «non-traditional» with whom he plans to fight on a legislative level[35]. One should in fairness mention that in later speeches he has been more restrained.

Certain court rulings also fail to encourage tolerance. Support in a dispute for the dominating denomination in the region is one example of discrimination. We could cite here the acquittal by a court in the Cherkasy region of a UOC (MP) priest accused of inciting inter-denominational enmity and assault on six Jehovah's Witnesses whom he actually beat up. This was despite the fact that the priest had publicly admitted to beating them and had stated that he «would do the same again» since the six had trespassed onto his territory and pushed him.

One can identify several «points of tension» and the levels to which they manifest themselves. In general, when characterizing *«points of tension»* (of intolerance) on religious grounds, they can be classified into several groups.

1. *Division into so-called «traditional – non-traditional» religions.* There is no legislative or other formalized classification (definition) of such a distinction. Loosely speaking, one could thus consider as traditional those religious movements which have existed in Ukraine for one hundred or more years, or at least existed in one form or another before the end of the 1980s, while non-traditional movements are those which appeared in Ukraine from the end of the 1980s, or which existed earlier, but with few members. An exception here would be the Jehovah's Witnesses who have been present in Ukraine since the beginning of the twentieth century, but are generally considered «non-traditional».

2. *Relations between different religions: i*n the main between Christians and Muslims, and between Christians and members of the Jewish religion.

3. *Inter-Church relations:* the relations between different Christian Churches, for example, between Orthodox believers and Catholics, between old and new Protestant movements, and others.

4. *Relations between different Orthodox Churches:* these need to be placed in a separate group since they form a separate topic of attention.

5. *Intolerance to religion:* a negative attitude to religiousness as such and its expression.

Intolerance can be expressed at the following levels:

♦ *at the everyday level* – not accepting the possibility of co-existence with members of other denominations and faiths, unwillingness to tolerate them;

♦ *at the social level* – not recognizing the right of communities with other religious views to exist, nor their right to their own missionary or other activities; intolerance in social institutions, for examples, educational or cultural institutions;

[35] Yury Reshetnikov: *The ignorance of some National Deputies has ceased to be startling ... Unfortunately //* http://www.risu.org.ua/ukr/religion.and.society/comments/article;12677/

♦ *at the governmental level* – public officials putting obstacles in the way of certain religious organizations from the position of their own religious or denominational views; dividing denominations into «ours» and «alien», «national» and «not national», favouring the first and showing prejudice to the others.

The most common problems with intolerance and discrimination on the grounds of religion and other convictions in Ukraine remain:

♦ disregard for the human right to freely practise any religion or none, to belong to a certain Church or to none;

♦ procrastination in transferring or allowing the use of property, with building permits, etc;

♦ obstruction of religious activities;

♦ preventive measures against new religious movements;

♦ religious intolerance in education and educational literature;

♦ dragging out registration and demands for additional documentation;

♦ lack of recognition of the hierarchical structure of some religious organizations;

THE ISSUE OF TOLERANCE IN INTER-DENOMINATIONAL RELATIONS

Tension continues in inter-denominational relations. In Ukrainian multi-denominational conditions, the most discomfort is experienced by Orthodox Churches. The main differences, and as a result, reasons for intolerance in relations between Orthodox Churches, are loosely speaking world-view-ideological, political – legal, and on the economic front. The number of Ukrainian Churches with common (Byzantine) roots are seen not as denominational pluralism, explained by the real guarantees for free choice (which did not exist under either Tsarist or Soviet totalitarianism) which should be tolerated, but as a schism, an anomaly which needs to be rectified. It is this logic which governs the attempts to in one way or another forcibly unite the existing Orthodox Churches into one Orthodox entity. Tolerance in this situation is often seen as a harmful obstacle to such unity since it legitimizes the situation which has emerged.

On the other hand, considering religious freedom to be a side effect of secularization, for Orthodoxy dialogue and respect are possible on condition of agreement in key doctrinal matters.[36] The primacy of truth over freedom of choice in seeking it is indisputable. It is for this reason that the concept of tolerance as «an active attitude prompted by recognition of the universal human rights and fundamental freedoms of others, [...]It involves the rejection of dogmatism and absolutism»[37], is alien to the Orthodox perception of the world. It is also important that Orthodox moral teachings deny the possibility of tolerating evil which is apostasy against the truth (schism) or its distortion (heresy). For this reason its tasks «(...) through unfitting intolerance to not create unnecessary obstacles in unification» does not apply to all Churches (Principles of the relation to other Slavs, Anniversary Synod of the Russian Orthodox Church, 2000). One can add to ideological factors the difference between legitimizing their own existence (the canonical Church, the Ukrainian Church, the Autocephalous Church, etc), the attitude to other religious organizations and political preferences.

Despite a more or less common attitude to the State authorities as such and a general model for State – Church relations, there is no agreement in the Orthodox milieu as to key issues of legislation on religious issues, provision of legal status and restitution for Churches and religious organizations. The most problematic area where intolerance is manifested in relations between Orthodox Churches, and inter-denominational relations as a whole is over property.

Among other acute points of intolerance in inter-denominational relations are those between Orthodox believers and Greek Catholics, particularly in western regions of Ukraine and in some populated areas in the East and South (Yalta, Kharkiv, Luhansk and others).

Relations remain strained between so-called «traditional» and «non-traditional» religious organizations. One quite often hears calls from the former to ban the activities of what they call sects.

[36] S. Harakas: Human rights from the perspective of Eastern Orthodoxy, in «Religious freedom and human rights. Theological aspects. Lviv, 2000, p. 235 (in Ukrainian)

[37] UNESCO Declaration of Principles on Tolerance (1995).

Related draft laws appear in parliament from time to time. A considerable amount of intolerance in this area is spread by the media.

In the Crimea, and sometimes in other regions, there are cases of intolerance between Orthodox believers and Muslims.

The symbiosis of post-communist times and the contemporary secular movement lies in intolerance towards religion in any shape or form. This is expressed, for example, in protests against the social activeness of the Churches, their attempts to have influence on the upbringing of young people, the inculcation of an entirely atheist worldview in education, etc. Most often this form of intolerance against religions is expressed by figures from the representative and government bodies, and from academic circles.

It should be noted that very often the authorities, both at local and at national level, manipulate the Churches, using tension in relations between Orthodox Churches. On the other hand, it is often the government which becomes the final arbiter in the dead end of intolerance.

EXAMPLES OF INTOLERANCE IN INTER-DENOMINATIONAL RELATIONS

The Head of the UOC (KP) Patriarch Filaret approached the President with accusations against the UOC (MP) of inciting religious enmity. In his address, Patriarch Filaret stated that «Ukrainian legislation prohibits the incitement of religious enmity, yet those responsible remain unpunished, and therefore their illegal activities take on an ever greater scale.»

During a press conference on 3 September 2006 in Poltava, Patriarch Filaret also criticized the Prosecutor General for refusing to institute criminal proceedings over actions preventing religious services in UOC (KP) churches. On 5 July he had sent the Prosecutor General O. Medvedko a complaint against the actions of the Progressive Socialist Party, «Union of Orthodox Citizens», «Proryv» [«Breakthrough»] as well as to the local eparchies of the UOC (MP) in the Crimea, and in the Donetsk, Odesssa, Rivne, Kharkiv and Chernihiv regions. «The response was in Soviet style. The upshot was a refusal. In his opinion, these organizations are deliberately inciting religious enmity and obstructing the transfer to UOC (KP) of churches.»

Conflict between believers of different Orthodox denominations, as well as cases of intolerance in relations between them, can be seen in many regions.

For example, a difficult situation has arisen in the Zhytomyr region over relations between the UOC (MP) and UOC (KP)[38]*. The public relations department of the Zhytomyr Regional Administration has stated that the denominational bias of heads of enterprise and of the local authorities is fostering inter-denominational tension. For example, in Irshansk (Volodymr-Volynsky district) a local charismatic congregation has been unable to reach an understanding with the settlement council. The problems lie in the latter refusing to lease the congregation premises or to consider their application at a council session, as well as in discrediting of their activities by the local UOC (MP) congregation. Representatives of the charismatic congregation are planning to organize protest actions aimed at achieving recognition of their right to carry out religious activities.*

RELIGIOUS VANDALISM

2006 was a record as against recent years in the number of fires in places of worship. Although the majority of these were caused by lack of care with fire, there were also cases of arson.

The Father Superior of the Kyiv Vasilyansky Monastery of the UGCC Father Vasyl Tuchapets informs that in the morning of 27 December an arson attack was carried out on the Greek Catholic Church in the village of Novi Bezradychi in the Obukhivsk district of the Kyiv region. The Father Superior is under no doubt that this was a deliberate case of arson since the Church had recently be restored, and any electrical wires which could have caused a short circuit had yet to be put in.

Vandals devastated the chapel of the Roman Catholic Church in the village of Dniprove near Dnipropetrovsk. The local Roman Catholic community has been trying for over three years

[38] The activities of the Orthodox Churches of the Zhytomyr region in the context of the social and political life of the region // http://www.risu.org.ua/freedom/news/article;12624/

to restore and reinstate the remains of the old church and territory it was built on up till 1985 when it was barbarically ruined. Over recent months the church territory had become an object of interest to private individuals who wanted to get their hands on this site of sacred importance for the Roman Catholic community. A cross had been erected at the site of the church and the foundations dug. Near the former church, old graves were found. A service was held at the end of November 2006 near the Cross, which the Head of the Kharkiv-Zaporizhya Roman Catholic Church Bishop Stanislav Padevsky took part in. The next night, unknown individuals bordered off half of the territory of the church. Local Catholics received only empty words from the local authorities in response to their numerous protests, and the seizure continued. The Catholic community decided to build a small chapel on the foundations of the destroyed church. Having raised the money, the construction was commenced and on 12 December the chapel was erected, however it was subjected to another attack during which the roof and wall were destroyed.

In 2006 there were a lot of cases where churches were burgled, with chalices etc used in church services and icons stolen. Most of these were for reselling to collectors in Ukraine and abroad. In the Khmelnytsky region they caught criminals believed responsible for several dozen burglaries of churches in that and neighbouring regions.

During 2006 there were less cases than in the previous year of acts of vandalism or other criminal offences out of anti-Semitism. Several cases were reported where memorial signs (memorial plaques and stones) were daubed in paint in Kyiv and Lviv, and where memorials were damaged at Jewish cemeteries, etc. Not one case was recorded of public incitement of anti-Jewish sentiments by members of other faiths. In general, it should be said, that manifestations of anti-Semitism are rather of an ethnic nature, and not religious.

RELIGIOUS TOLERANCE AND THE MEDIA

Journalists are often thoughtless in their coverage of religious issues. They can unintentionally offend believers through their publications. An intolerant attitude to some religious organizations is also seen in the failure to understand specific aspects of their religious activities.

For example, the journalist R. Kostritsa, in naming his article «Hassidim drown their joy in horilka [like vodka][39] insisted that members of this religious movement within Judaism drink alcohol to excess, although he was writing about the celebration of the New Year according to the Jewish calendar in Uman, the Cherkasy region.

However, the majority of cases of intolerance in the mass media can be considered deliberate.[40] One can cite several examples: the TV programme «Top Secret. Sects», broadcast on 6 February 2006 by the TV company STB; the roundtable on the topic «Faith, society, politics» on the capital's television channel «Kyiv» on 4 April 2006 then repeated as part of the programme «5 minutes with Volodymyr Zamansky»; special reports on Charismatic Churches on ICTV in the programme «Facts with Oksana Sokolova» (10 September 2006 and others); certain broadcasts of the programme «Sincere confession» on «Ukraina»; the broadcasting on the State Television and Radio Company «Crimea» of a film made for television called «Brides of Allah» from the «Absolutely confidential» cycle of the Russian TV channel NTV which showed numerous shots from the war in Chechnya, accompanied by subjective and not always adequate assessments of the authors; as well as other television programmes.

Films continue to be shown on regional television channels which lead to an intolerant and antagonistic attitude to Protestant Churches. Examples of these are the film «Attempt on freedom» which was created by the civic organization «Union for the protection of the family and the individual» (Kyiv); the film «Religion, politics, extremism» and «Golden calf» made by the Dnipropetrovsk Centre for helping victims of destructive cults «Dialogue», and so forth.

[39] The newspaper «Kommersant – Ukraina», 25 September 2006: http://www.kommersant.ua/doc.html?DocID=707094&IssueId=35738

[40] Maxim Vasin: *Realities of religious freedom in Ukraine: facts from 2006* // http://www.risu.org.ua/eng/religion.and.society/analysis/article;14799/

These and other such programmes and films have led to many open letters and appeals from believers and heads of Evangelical Protestant Churches. They have called on the authorities to stop broadcasts on so-called «totalitarian sects» which give distorted or untruthful information about the activities of Evangelical Churches, twist the facts and make up video footage to strengthen the impression from a biased presentation of information.

Nor was it a rare occurrence in 2006 to have publications in the press which, in their content, exacerbated the conflict between Orthodox Churches, and also incited religious enmity with regard to Charismatic Protestant Churches, labelling the latter «sects» or «totalitarian cults» (for example, the article «Invitation to a sect» in the Kyiv edition of «Ukrainian newspaper. Russian version» № 5 (54) from 1-7 February 2006 року; the publication «The Orthodox Church warns: Beware! Sectarians!» in the newspaper «Rovenkovtsy news» in the Luhansk region). It is also typical that most often such programmes and publications do not present any convincing and confirmed facts regarding the alleged destructive nature of the religious communities presented in the feature, while the lack of clear definition regarding the name of such a religious community or movement leads to the label «sect» being applied even to a Protestant Church which has existed in Ukraine for many years (Baptists, the Pentecostal Church, Lutherans and others).

Among what we would consider to be the most intolerant publications which spread religious intolerance, are those of authors close to the «Union of Orthodox Citizens of Ukraine», the website of «Yedinoye otechestvo» [«Single homeland»], «URA-inform», the newspaper «2000», the website «Ukraina kriminalnaya», «From-UA.com», «Fraza.com.ua», and «Obozrevatel» [«Observor»]. Their attention is focused on relations between Orthodox Churches and confrontation, on assessing the activities of so-called «non-canonical» or «non-traditional» Churches and religious organizations (for example, the activities of the religious organization «Assembly of God»). Intolerant publications also appear on many other websites and in printed publications, included State-owned newspapers like «Holos Ukrainy»[41].

One cannot leave without mention material in denominational publications, for example, on the official website of the UOC (MP) website. Here the number of critical articles about the «schismatics» (especially the Head of the UOC (KP) Patriarch Filaret) and the «Uniates»[42] are close to the number of publications on the UOC (MP) itself. Intolerance with respect to other denominations is also found in some regional (eparchy) Church publications.

11. CONCLUSIONS AND RECOMMENDATIONS

The following main violations of freedom of conscience can be highlighted:

1. An increase (as against 2005) in intolerance in inter-denominational relations, first and foremost, between different Orthodox Churches. There were prominent examples of aggressive behaviour from the pro-Russian organizations «Union of Orthodox Citizens of Ukraine», Yedinoye otechestvo» [«Single homeland»], «Proryv» [«Breakthrough»] against the UOC (KP), UGCC (Chernihiv, Kharkiv, Odessa, Rivne, Kyiv) and passive connivance in their activities from the law enforcement authorities;

2. Due to the change in government, especially in eastern and southern regions examples were recorded of representatives of the newly-elected majority favouring some denominations against others. One of the most glaring examples of this is the Mayor of Kharkiv who openly patronizes the UOC (MP) and refuses to recognize other denominations, in particular UOC (KP) or UAOC;

3. Many cases of vandalism (words on the walls of synagogues, churches, destruction of sacred structures, memorial signs, etc);

4. Particularly noteworthy are cases of intolerant publications in the media (the newspapers «2000», «Holos Ukrainy», numerous Internet publications and those of specific denominations).

[41] Irpeniada. The Verkhovna Rada's newspaper demonstrates religious bias // http://www.risu.org.ua/freedom/monitoring/article;12379/

[42] Uniate refers to the Ukrainian Greek Catholic Church. It is not a term which the latter themselves use, since they feel it to have negative associations (translator)

Especially dangerous are the «anti-sectarian» programmes on television (ICTV, TV Channel 5) which bear the hallmarks of material commissioned against certain political figures;

5. There are still problems with the return of places of worship expropriated from religious organizations during Soviet times and with allocation of land for new buildings. Whereas in 2005 the process of allocation of land was activated, in 2006 this process folded, and there were event attempts to take back already allocated land. For example some political figures and local deputies are attempting to take away a land site from the Yalta community of the UGCC which was allocated them by the Yalta City Council in 2005;

6. Due to flaws in legislation the right of religious peaceful assembly continues to be infringed given the demand that they obtain permission;

7. There remain unconstitutional and unwarranted restrictions on the right to freedom of conscience and religion for foreign nationals;

8. The situation with registering religious organizations has not improved with infringements of the right to freedom of association continuing.

DANGEROUS TRENDS

– The folding of the work of inter-denominational councils in some regions, these having been created in the regions on the instruction of President Yushchenko in 2005. This decreases the level of democracy and balanced consideration in decision making by local authorities;

– The reinstatement of the State Committee on Matters of Nationalities and Religion which experts believe could lead to a folding in the democratic forms of relations between the government and religious organizations, an increase in control over religious life and possible interference in internal Church affairs.

– The lack of reaction from law enforcement agencies to public incidents inciting religious antagonism (statement from the Head of the UOC (KP) to the Prosecutor General regarding threats from certain organizations), passive approach in investigating cases of vandalism.

POSITIVE TRENDS:

– A new version of the Law «On freedom of conscience and religious organizations» was drafted with this being presented for public discussion (for the first time in Ukraine's history). The draft law envisages more opportunities for religious organizations to defend their freedom of activity and reduces the control of the government over religious life. However experts believe that there is a danger that National Deputies could, when discussing and adopting it, make changes which would nullify its positive features and could quite likely lead to one denomination being favoured over others.

– Almost by the end of the summer there had been an increase in the level of activeness by religious organizations themselves, including with the use of the mass media. The theme of defence of religious freedom is more often heard at theoretic and practical conferences. However with the creation of the new government coalition, there was a noticeable reduction in human rights activities among religious organizations.

SUGGESTIONS ON IMPROVING THE SITUATION

1. Ukrainian legislation should be brought into conformity with the demands of Articles 9 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the light of the court case law of the European Court of Human Rights, in particular, as regards ensuring the neutrality of the State, the possibility for a religious community to receive legal entity status and to freely practice their religion.. For this it would be desirable to apply the «Guidelines for Review of Legislation Pertaining to Religion or Belief» prepared by the OSCE / ODIHR and the Venice Commission in 2004[43]

[43] Freedom of Religious and Worship in Ukraine within the context of compliance with European standards (in Ukrainian) / Edited by Volodymyr Yavorsky / Ukrainian Helsinki Human Rights Union and the Centre for Legal and Political Studies «SIM». Kharkiv: Folio, 2005. Available on the UHHRU website at: www.helsinki.org.ua.

2. In drawing up a new version of the law on religious organizations the focus should be moved away from checking out organizations at registration stage to monitoring their activity: to accordingly shorten and simplify the registration of religious organizations, making the procedure at least analogous with the registration of civic associations.

3. Discrimination must be eliminated when registering the charters of religious communities and the grounds clearly defined for refusing to register or for cancelling the registration of the charters of religious communities.

4. The public authorities should not interfere in internal church matters, in particular, those concerning the creation of a single Local Orthodox Church., nor should they impose any particular single organizational structure, defend one of the sides in internal Church conflicts, etc.

5. Effective mechanisms are needed for avoiding discrimination on religious grounds, particularly in the penal system, the social sphere and in the area of labour relations. It is also vital to make adjustments to legislation on taxation of religious organizations in order to remove discrimination against non-Christian organizations.

6. Law enforcement agencies must react appropriately to cases of incitement to religious hostility, especially from dominant religious organizations, and parties fighting organizations which they consider to be sects..

7. In order to eliminate discriminatory administrative practice and conflict between churches, clear legal norms should be passed stipulating the grounds, procedure and time periods for returning church property. It would also be expedient to draw up a detailed plan for returning religious property with these procedures and the time taken for each object defined. Where it is impossible to return such property, provision of some compensation should be stipulated, in particular, for the construction of new buildings of worship.

8. Local authorities should review legislative acts they have passed which establish discriminatory provisions, and also additional limitations, not foreseen by the law, on freedom of religion when holding peaceful gatherings, renting premises, allocating land and returning religious buildings. General principles should also be clearly outlined for the allocation of sites for building places of worship.

9. Public control should be established over the adoption of legislation for regulating freedom of thought, conscience and religion, for example, by carrying out monitoring, including on issues pertaining to the restitution of property expropriated by the Soviet regime, introducing amendments to laws regulating the right to education and to those on land issues.

10. Permanent joint Commissions with representatives of both religious organizations and of the government should be created in order to resolve issues of mutual concern (property, cultural monuments, the family, education, etc).

11. Courses on religious tolerance should be introduced for journalists as well as courses on the right to religious freedom for personnel of the public authorities.

VII. THE RIGHT OF ACCESS TO INFORMATION[1]

The situation as far as freedom of information is concerned remained much the same in 2006 as in 2004-2005. Legislative regulation and administrative practice did not change. Therefore the presentation of issues, analysis, conclusions and recommendations in the last two reports[2] remain current.

We would note that the Ministry of Justice did prepare a draft law on amendments and additions to the Law «On information» which was posted on the Ministry's website for public discussion and also sent to the Council of Europe for comments. Both the public and the Council of Europe were severely critical of the draft law which was then considerably reworked in February – March 2007 with the participation of human rights organizations. However it was not then tabled in parliament as a result of the political crisis.

The preparation and debate over this draft law once again vividly highlighted two conflicting trends with regard to openness from the authorities: the demand from the public to know everything about the activities of the government and its officials pitched against the firm aversion of the latter to openness and wish to conceal their activities. On the other hand, talk about «transparency of governance» has in recent years become popular not only among specialists on access to information and academic circles. These days, all of Ukrainian society is caught up, in different roles, in the «performance: «Information openness: Ukraine: dream and reality». High-ranking public officials at all of the highest-level international meetings assure the European and world community of their commitment to democratic values and in official speeches they declare a course towards information openness. Yet when members of the public demand that they stop unlawfully classifying information, it transpires that the talk about how it is the government's direct duty to safeguard the right of access to information was just that – mere words and even those were for international consumption and not for their own community.

While some try to draw up mechanisms for ensuring the right to information, others assert the need for information security of the State above all else, understanding by this totally classifying information about the activity of the authorities. The latter do not understand that in fact such an interpretation of information security is outdated in the modern world. Safeguarding information security as an element of national security means, first and foremost, ensuring the right to know what the authorities are doing since only «wide access to information enables members of the public to form an adequate view and critical assessment of the state of the society which they live in and of the authorities in charge. This encourages people to take an informed part in issues of public importance, fosters greater efficacy and efficiency from administrative agencies and helps to support their integrity and avoid corruption. It is a factor which confirms the legitimacy of the bodies of governance as State services and strengthens public confidence in the authorities»[3].

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[1] Prepared by the head of the UHHRU Board and co-chair of KHPG Yevhen Zakharov, PhD student in constitutional law at the Yaroslav Mudry National Law University Oksana Nesterenko and legal adviser to the «Maidan» website Oleksandr Severyn.

[2] «Human Rights in Ukraine – 2004, Kharkiv. Folio, 2005, Human Rights in Ukraine – 2005. Kharkiv. Folio, 2005. These are available in English and Ukrainian at the UHHRU site: www.helsinki.org.ua and that of KHPG www.khpg.org .

[3] Freedom of information and the right to privacy in Ukraine. V.1: Access to information: hic et nunc! / Kharkiv Human Rights Protection Group. Kharkiv. Folio, 2004

In 2006 human rights organizations continued training the authorities and bodies of local self-government to adhere to legislation and respond to information requests and letters. These activities are part of a joint project entitled «Access to information about the work of the authorities and bodies of local self-government» begun in 2005. In order to carry out an analysis of the state of play with access to information, the following 19 organizations formed a network: the «Maidan» Alliance; the Podillsk Human Rights Centre (Vinnytsa); the Kirovohrad Association «Civic Initiative»; the children's environmental organization «Flora» (Kirovohrad); the Odessa, Kherson and Luhansk regional branches of the Committee of Voters of Ukraine; the environmental-humanitarian association «Zeleny svit» [«Green World»] (Chortkiv, Ternopil region); the Ukrainian environmental association «Zeleny svit»; the Kharkiv Human Rights Protection Group; the Kherson regional youth organization «Youth Centre for Regional Development»; Donetsk Memorial; «Legal Education Centre (Kalush, Ivano-Frankivsk region); the Committee on Monitoring Press Freedom in the Crimea; the East Ukrainian Centre for Civic Initiatives (Luhansk); the International Society for Human Rights – Ukrainian Section; the NGO «For the rights of each of us» (Kremenchug); the Civic Organization «M'ART» (Chernihiv); and the Chernihiv Civic Committee for the Protection of Human Rights. During 2005, 2006 and the first two months of 2007, they sent information requests and appeals to regional authorities and bodies of local self-government with the same previously agreed questions. The letters to the central authorities were sent by the «Maidan» Alliance together with the Kharkiv Human Rights Protection Group.

The aim of the study was not merely to ascertain the general situation in the country with access to information, but also to identify any trends over recent years towards greater openness among the authorities and bodies of local self-government, as the latter maintain are evident, and to also establish the main reasons and factors at play with violations of the right to information. Analysis of responses to information requests also makes it possible to identify the failings, gaps and clashes in information legislation. The monitoring enabled us to assess the impact of the human factor (the general level of awareness and openness of public officials and civil servants, their level of knowledge of legal regulation regarding access to information, the grounds for limitation). As a result we were able to prepare recommendations for improving the mechanisms of access to information. The project covered the entire network of government agencies and bodies of local self-government. The information requests were sent to the Verkhovna Rada, the Constitutional Court, the High Council of Justice, the President and his Secretariat, the Cabinet of Ministers, central and local authorities, law enforcement agencies, the judiciary and bodies of local self-government. All regions of Ukraine, as well as the Autonomous Republic of the Crimea were covered.

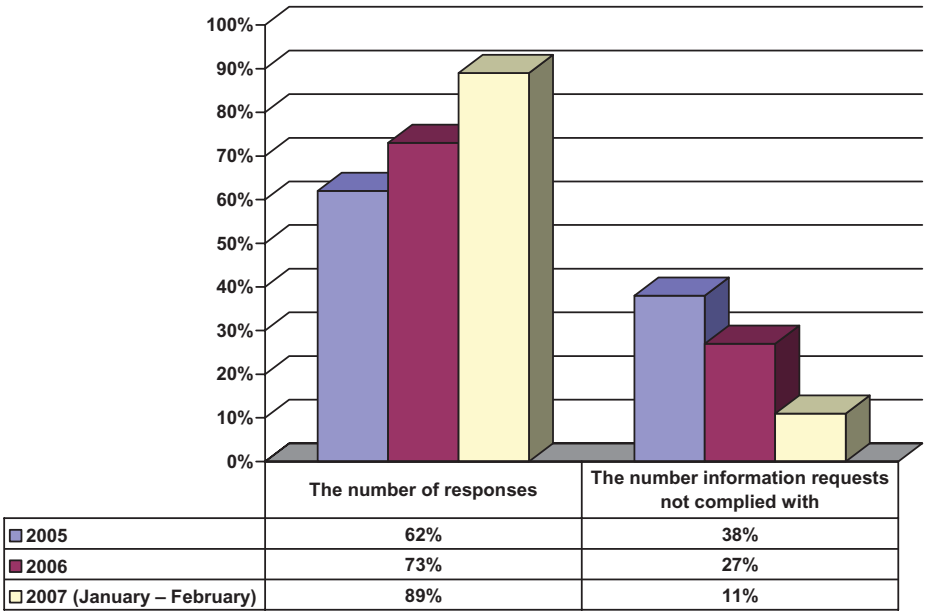
In assessing the general level of availability of information about this or that structure, the following factors were taken into account: 1) the overall number of responses to the information requests; 2) the number of such requests for information actually complied with; 3) the number of refusals to provide the information or document; 4) the number of requests simply not responded to; 5) the substantive nature, fullness and accuracy of the response; and 6) whether the information or document was provided within the stipulated time frame.

We also analyzed the reasons why the recipients refused to provide the information.

In detail, then, throughout 2005, 2006 and January – February 2007, a total of 1,528 information requests were sent: 376 in 2005; 1,041 in 2006; and 111 in the first two months of 2007. Human rights groups sent 15 information requests to the Verkhovna Rada; 17 to the President and Presidential Secretariat; 15 to the Cabinet of Ministers; 2 to the Constitutional Court; 2 to the Accounting Chamber; 4 to the National Television and Radio Broadcasting Council; 596 to Ministries and State Committees and central executive bodies with special status; 382 requests to local executive offices of territorial agencies of Ministries and State Committees; 149 to local and appellate courts; 89 to prosecutor's offices; 149 to bodies of local self-government (including the Crimean Parliament and Council of Ministers); 7 to National Deputies (MPS) and 1 request was sent to the Kyiv city directorate of Ukrposhta [the Ukrainian Postal Service].

Overall 604 requests for information were complied with; another 242 were partially met. In 2005 we received 178 responses; in 2006 – 612; and for the first two months of 2007 – 56. These results would seem cause for some optimism and one might even think that at the beginning of 2007, in comparison with 2005, the situation as far as safeguarding the right to information is concerned had improved considerably.

Diagram No. 1.



However the fact that in percentage terms the largest number of responses received was at the beginning of 2007 does not, regrettably, indicate that the work of the authorities in Ukraine has become more transparent. On closer analysis of the situation with access to information regarding the work of the authorities a quite different picture begins to emerge. For example, in 2007 not one of the requests for information sent to the Verkhovna Rada, the Ministry of Internal Affairs (MIA) or the central authorities was met. Only 9 responses, against 27 were received from local and appellate courts. National Deputies ignored their electorate with only one response received from 4 requests, while the bodies of the territorial communities disregarded their own communities, with only 4 of the 10 requests sent this year being met. Thus, in January – February 2007 satisfactory results regarding provision of information were received only from the local authorities, with these meeting 67% of the requests. However if one compares this figure with that for 2006, one sees that it has actually fallen by 2 %.

Table summarizing the results for all authorities in January – February 2007

Addressee request / marks	Number of information requests sent	Total number of responses (letters notifying that the information could not be provided)	Number of responses to information requests		The number of letters notifying whether it would be possible to provide the information or document requested		The number of information requests met	The number of information requests partially met	The number of refusals to provide the information or document requested	The number of information requests where no response was given
			The number received within the legal time limit	The number received outside the legal time frame	within the 10-day period	late				
Verkhovna Rada	1	1	0	0	0	1	0		1	0
State Department for the Execution of Sentences	0	0	0	0	0	0	0	0	0	0
The prosecutor's office	3	3	2	0	0	1	1	1	1	0

MIA	3	2	0	0	0	2	0	0	2	1
SBU [Security Service]	2	2	1	0	0	1	1	0	1	0
Courts	27	21	8	1	9	3	9	0	12	6
Central authorities*	3	0	0	0	0	0	0	0	0	3
Local authorities, territorial branches of Ministries and State Committees*	58	40	38	1	0	1	35	4	1	18
Bodies of local self-government	10	5	3	1	1	0	3	1	1	5
Information requests to National Deputies	4	2	1	0	1	0	1	0	1	2
Total	111	76	53	3	11	9	50	6	20	35

Taking information requests for the entire monitoring period into account (2005- February 2007), we see that the right of access to information via information requests is most often infringed by National Deputies – 71%; the Verkhovna Rada – 67%; prosecutor's offices – 66%; the President and his Secretariat – 65%; the Security Service (SBU) – 58%; the Cabinet of Ministers – 54%; and the State Department for the Execution of Sentences – 51%.[5]

In 2005 the least forthcoming with information were the Security Service, the appellate and local courts, the prosecutor's office, and the State Department for the Execution of Sentences. Not one information request was met by SBU. The courts refused to give information in response to 68% of the requests, and simply ignored another 8%. The prosecutor's office did not meet 74% of the requests sent did not elicit the information. This is despite the laws regulating the work of these bodies all proclaiming that their work is based on the principle of openness (information transparency). These are the laws «On the prosecutor's office» (Article 6.5; «On the State Department for the Execution of Sentences» (Article 2.8); and «On the Security Service of Ukraine» (Article 3).

However, only the Ministry of Internal Affairs (in comparison with other law enforcement and judicial bodies) in 2005 conscientiously fulfilled its duty to inform the public about its activities. This was in compliance with Article 3 of the Law «On the police» which states that «the activities of the police shall be open. They shall inform civic organizations and the public about their work, about the situation with public order and measures on improving this».

In 2005 the most forthcoming with information were the central authorities, as well as the Accounting Chamber and the Constitutional Court. Yet by 2006 it had become more difficult to obtain information about the central authorities. And the Accounting Chamber and the single body of constitutional jurisdiction completely refused to provide the information requested.[6] The Constitutional Court, for example, refused to provide information about the number of appeals from individuals or legal entities it had received, as well as information about the number of decisions taken to institute proceedings and the number of refusals to do so. It is the responses to information requests from Ukraine's Constitutional Court which can serve as a litmus test for the transparency of the entire State mechanism, since it occupies the main position in the mechanism for protecting the rights of the individual, including his or her right to information. The question necessarily arises, therefore: if the single body of constitutional jurisdiction in Ukraine, whose main task is to guarantee the primacy of the Constitution as the Main Law of the land over all Ukrainian territory refuses to adhere to the Constitution and safeguard the right to information enshrined therein, can one expect other government institutions to not violate this fundamental right?

One can point to a positive trend in 2006 in the number of proper responses to information requests addressed to law enforcement and judicial bodies. In the ratings as far as being open with in-

* Not including the law enforcement agencies and the Department for the Execution of Sentences

[5] See the table: Level of compliance by the authorities and bodies of local self-government with information requests in percentages.

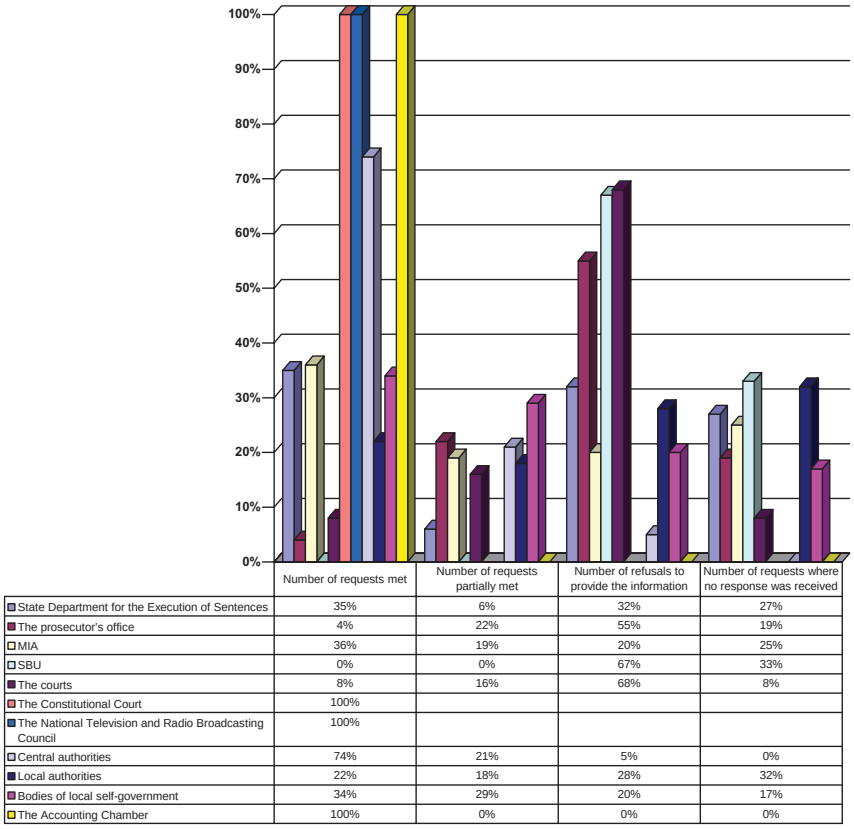
[6] See the graph on the number of proper responses from high-level government offices and central authorities as a percentage of the number of information requests (2006).

formation is concerned, top place was taken by the judiciary, second in terms of requests met went to local authorities, while the National Television and Radio Broadcasting Council took third place.[7]

Table showing the level in percentages of compliance by the authorities and bodies of local self-government with information requests, 2005-2007 (January-February)

Recipient	Number of requests met	Number of requests partially met	Number of refusals to provide the information	Number of requests where no response was received
Verkhovna Rada	33%	0%	7%	60%
National Deputies	29%	0%	29%	42%
The President and the Presidential Secretariat	29%	6%	6%	59%
Cabinet of Ministers	33%	13%	47%	7%
Constitutional Court	50%	0%	50%	0%
Accounting Chamber	50%	0%	50%	0%
National Television and Radio Broadcasting Council	75%	0%	25%	0%
Central authorities	55%	9%	21%	15%
Local authorities and territorial branches of ministries and State departments	40%	21%	18%	21%
The courts	45%	12%	34%	9%
The prosecutor's office	22%	12%	57%	9%
SBU	28%	14%	44%	14%
MIA	42%	19%	28%	11%
The State Department for the Execution of Sentences	42%	7%	26%	25%
Bodies of local self-government	32%	28%	21%	19%

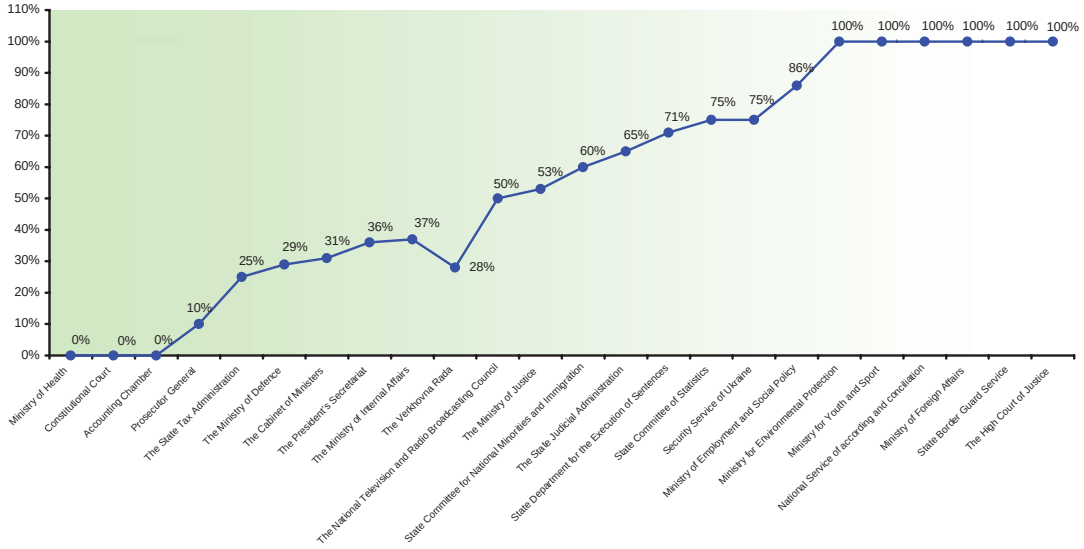
Graph showing the information requests met in 2005



	Number of requests met	Number of requests partially met	Number of refusals to provide the information	Number of requests where no response was received
State Department for the Execution of Sentences	35%	6%	32%	27%
The prosecutor's office	4%	22%	55%	19%
MIA	36%	19%	20%	25%
SBU	0%	0%	67%	33%
The courts	8%	16%	68%	8%
The Constitutional Court	100%			
The National Television and Radio Broadcasting Council	100%			
Central authorities	74%	21%	5%	0%
Local authorities	22%	18%	28%	32%
Bodies of local self-government	34%	29%	20%	17%
The Accounting Chamber	100%	0%	0%	0%

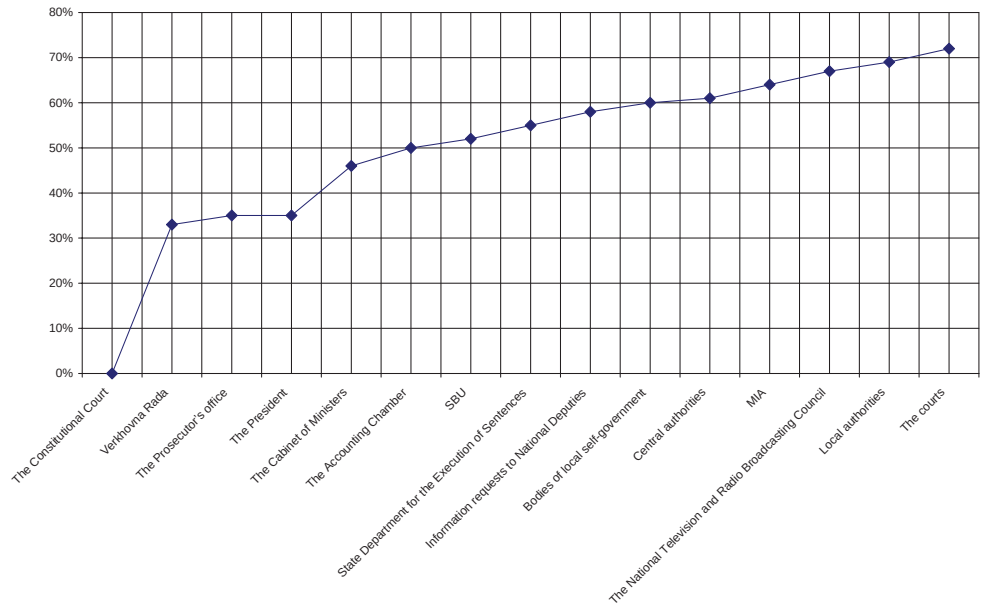
[7] See the graph showing the number of proper responses from the authorities and bodies of local self-government as a percentage of the number of information requests (2006).

Graph showing the number of proper responses from high-level government offices and central authorities as a percentage of the number of information requests (2006)



requests	11	1	1	39	8	7	13	14	43	13	2	34	10	52	14	4	8	7	5	1	3	1	1	1

Graph showing the number of proper responses from the authorities and bodies of local self-government as a percentage of the number of information requests (2006)



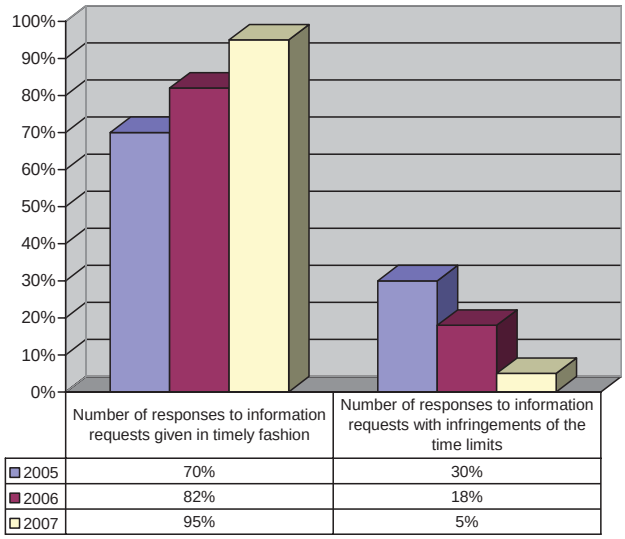
A REQUEST SHALL BE MET WITHIN A MONTH, UNLESS OTHERWISE PROVIDED BY LAW. (ARTICLE 33 OF THE LAW «ON INFORMATION»)

Given the specific nature of information, the fact that it spoils quicker than milk left in the sun, it is not only important whether a request is met, but also how quickly the information or document is provided. During the entire project 677 responses were provided in the time stipulated by law, this meaning that 169 responses were late. On average they came 2 – 3 weeks late, although there were occasions where the period reached three months. For example, the National Television and Radio Broadcasting Council responded to a request from 11 August 2006 near the New Year, on 14 December, despite there being no objective grounds for such a delay. The said Council had been asked for information about the number of licensed television and radio organizations. Incidentally, «notification of postponement in meeting a request when the period for providing the information

exceeds the legally established period» throughout the entire monitoring only came a few times. We can thus state that the norm binding the authorities in case pf postponement to inform the person requesting the information in written form (Article 24 of the Law «On Information» is hollow.

In general with each year the authorities become better at providing the information requested within the time limits.

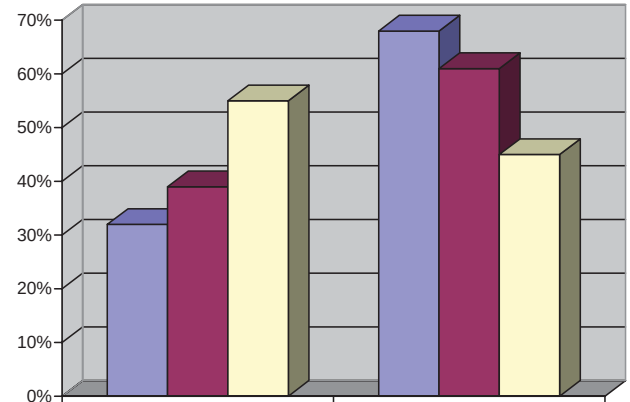
Diagram No. 2



	Number of responses to information requests given in timely fashion	Number of responses to information requests with infringements of the time limits
2005	70%	30%
2006	82%	18%
2007	95%	5%

The monitoring showed that public officials and civil servants systematically infringe Article 33. § 1.2 of the Law «On Information» which states that «The terms for addressing such request shall not exceed ten calendar days[8]. During this period a State body shall inform in writing the requestor that his/her request will be addressed or that the document required cannot be disclosed». The project researchers gained the impression that the authorities and bodies of local self-government refused to meet a request precisely in the time frame stipulated by law for meeting a request, i.e. within a month, and that they were not aware of the 10-day limit for notifying that a request would not be met. Furthermore, the authorities ignore the requirement to send notification that the «request is being processed and the information sought will be provided within the established period». During the monitoring we received no more than twenty such letters. There were also oddities as when the notification that the information would be provided arrived, but the information never appeared.

Diagram No. 3



	Number of letters of notification as to whether the information would be provided	Numbers of letters of notification with infringements of the time limit
2005	32%	68%
2006	39%	61%
2007	55%	45%

[8] See Diagram No. 3

DO PUBLIC OFFICIALS AND CIVIL SERVANTS NOT KNOW WHICH LAW REGULATES PROCEDURE FOR ISSUING INFORMATION?!

From processing the responses which arrived from the authorities or bodies of local self-government, it became clear that public officials and civil servants do not know which law regulates procedure for responding to information requests. For example, the SBU Division in the Kirovohrad region, in giving reasons why it could not provide the information, referred to Article 5 of the Law «On citizens' petitions», a «written petition must be signed by the petitioner with the date indicated. A petition which does not comply with this shall be returned to the petitioner». However, the petition was, firstly, prepared correctly with the signature of the petitioner and the date, and, secondly, the Law «On citizens' petitions» is not aimed at exercising the right to information (Article 34 of the Constitution), but the right to file individual or collective petitions (Article 40 of the Constitution), and this is, by its juridical nature, a different right. The Law «On citizens' petitions» regulates the exercising in practice by members of the public of their right as set down in the Constitution to submit to the authorities or civic organizations in accordance with their charter proposals on improving their activities, to identify shortcomings in their work, appeal against the actions of public officials, government or public agencies. The Law ensures that Ukrainian citizens have the opportunity to take part in governance of State and public matters, to contribute to an improvement in the work of the authorities and bodies of local self-government, enterprises, institutions and organizations regardless of their form of ownership, in order to uphold their rights and legitimate interests and to reinstate these should they have been infringed. According to Article 1 of this Law petitions should be understood as meaning verbal or written proposals (comments), applications (petitions) and complaints.[9] The procedure for receiving information by submitting an information request is regulated by the Law «On information», in particular Articles 32-37. Further proof that civil servants do not see a difference between the right to information and the right of petition can be found in the response from the Kaluha City Council Executive Committee in the Ivano-Frankivsk region.[10] Instead of information «where there are internal instructions on the procedure for information requests», the Executive Committee provided information about the procedure for citizens' petitions.

The fact that public officials and civil servants in considered information requests to the authorities or bodies of local self-government apply the Law «On citizens' petitions» is, regrettably, proof of the low level of professional training of Ukrainian lawyers and the fact that the authorities and bodies of local self-government lack specialists on working with information requests regarding access to official documents and requests for written or verbal information.

WHAT A PING PONG HAS IN COMMON WITH AN INFORMATION REQUEST

On 9 September 2006 the Prosecutor General was sent an information request seeking the number of established cases where the time limits for administrative detention have been exceeded and information about the reaction to such cases. Instead of the information expected, the Prosecutor General's office notified that the request had been passed on to the State Committee of Statistics since the reporting by prosecutor's offices does not envisage the information sought. In its turn the State Committee of Statistics refused to provide the information due to the lack of the data requested. The latter's response stated: «The State Committee cannot agree with the Prosecutor General's office having redirected your information request to it from 09.09.2006 and notifies

[9] Article 3, § 2, 3, 4 of the Law «On citizens' petitions»: «Proposals (comments) are citizens' petitions which express advice, recommendations on the activity of the authorities or bodies of local self-government, deputies at all levels, public officials; and also present opinions on regulation of public relations and living conditions for citizens, improvement of the legal foundations of State and civic life, socio-cultural and other spheres of activity of the State and society.
An application (petition) is an appeal from citizens seeking the exercise of their rights and interests as enshrined in the Constitution and current legislation, or notification of a violation of current legislation or shortcomings in the functioning of enterprises, institutions and organizations regardless of their form of ownership, of National Deputies, deputies of local councils, public officials, as well as expressing an opinion regarding improvement of their work. A petition is an appeal in writing requesting recognition of the relevant status, rights and liberties, etc.
A complaint is an appeal demanding restoration of the rights and protection of the legitimate interests of citizens violation through the actions (omissions) or decisions of government bodies or bodies of local self-government, enterprises
[10] Response from 26.10.06 to an information request from 29.09.06

of the following. Since 1995 State Statistics agencies have implemented State statistical observation in accordance with form 1-AP «report on the examination of cases on administrative offences and administrative charges against individuals» (Order of the State Committee of Statistics from 19.10.95 № 266). The main aim of this observation is to collect information regarding established cases involving administrative offences. At the same time, your letter raises the question of ensuring the rules for proceedings into administrative offences which in accordance with Article 250 of the Code of Administrative Offences is part of the prosecutor's office 'supervision which is carried out by prosecutors or their deputies. Detected cases of such violations, for example, as regards exceeding the time limit for administrative detention and the results of responses to these cases can be establishing only from the documents of a prosecutor's check. The State Committee of Statistics does not, therefore, have the information to provide an answer to your request».

From this text one can conclude that a vicious cycle has emerged and there is no way of receiving information regarding the number of established cases where the time limits for administrative detention have been exceeded and information about the reaction to such cases Since neither the Prosecutor General's office nor the State Committee of Statistics deem it necessary to record cases where a fundamental human and civil right – to freedom and personal inviolability (Article 29 of the Constitution) has been violated. This prompts one to think that either the Prosecutor General's office does not wish to provide the information requested, or the prosecutor's office is generally not fulfilling in proper manner its overseeing functions linked with the observance of the law as regards administrative detention.

THE INFORMATION REQUESTED IS CONFIDENTIAL?!

The Kherson regional youth organization «Youth Centre for Regional Development» approached the Kherson Regional Council and the Henichesk District Council of the Kherson region asking for a list of their deputes (their last name, first name and patronymic, date of birth, place of work when elected deputy, what party faction they were voted in on, party affiliation, which faction they actually joined, date and reason for relinquishing their mandate early). However the request was turned down because the addressees deemed this information to be confidential. Such refusals to provide information are not only grave infringements of the right of access to information, they are also patently absurd. Regional and district councils are bodies of local self-government which represent the common interests of territorial communities and not their own interests (Article 10 of the Law «On the status of National Deputies»). It is incomprehensible how individuals who represent the interests of a territorial community can remain unknown to the latter. Even a person not up on the law understands that information about the makeup of the deputy corps, including names, cannot be confidential. Nor was it deemed confidential by the deputies themselves and the media during and after the election campaign. Furthermore, Article 36.8 of the Law «On the election of deputies of the parliament of the Autonomous Republic of the Crimea, local councils, and village, settlement and city mayors», one of the conditions for registering candidates for the office of deputy in multi-mandate districts is the person's consent to biographical information being made public.

HOW MUCH INFORMATION COSTS

Two information requests sent in October and November 2006 to the Kakhovske City Council by the Youth Centre for Regional Development failed to elicit the information expected, but instead a letter from the Executive Committee asking them to pay 3 thousand UAH for it, without giving any reason whatsoever for the charge. The director of the Centre M.V. Honchar correctly notes that according to Article 36 of the Law «On information» «The Cabinet of Ministers of Ukraine or other state institutions shall determine payment procedures and fees for the collection, search, preparation, creation, and supply of requested written information, provided the said fees do not exceed the expenses actually entailed to meet such requests», while Articles 35 and 36 of the Law only directly mention fees for copying documents. The Executive Committee overcharged for such services.

CAN NAMING AN ALTERNATIVE SOURCE WHERE THE INFORMATION CAN BE FOUND BE REGARDED AS MEETING THE REQUEST FOR INFORMATION?

A common reason given for not providing the information is that the information can be found elsewhere. Firstly, however, the right of access to information can be exercised in different ways, and the fact that bodies of local self-government are obliged to publish information about their activities through official publications, on their websites, and so forth (passive access) does not absolve them of the duty to provide information via formal requests for information. Secondly, even if one allows that it may be possible to meet a request for information when, instead of actually providing the said information, a place where it can be found or an official document is named, the response must give not only the name of the sources, but also if it is a particular body's official publication the number, year and pages where the information or document can be found. In cases where a website is suggested as source, the specific address should be given. Otherwise obtaining the information from the other source will be problematic, if not actually impossible.

For example, in a response from 07.11.06 No. 205/3 to a request from 25.09.06 «to provide information about the yearly budget and how it was applied», the Odessa City Council replied that the information requested had been published in the Council's newspaper «Odessa Herald» and on its official website (www.city.odessa.ua). However it did not indicate in which specific issues of the newspaper the budget and information about its use had been published. Moreover, the website address was wrong and the information was available on the information site of the city at: http://www.misto.odessa.ua/, and given the lack of number or date of the resolution (adopting the budget), finding it among the 164 resolutions in 2006 on the site was a fairly difficult task. It was even harder to find information about how the budget had been spent.

One can also cite the refusal to provide information requested which came from the Nova Kakhovka City Council. The refusal was justified on the grounds that «the information requested is constantly published in the newspaper «Nova Kakhovka» and other local publications».

We are convinced that one cannot regard a request for information to have been complied with if an alternative source is given instead of the actual information. The draft law «On information» prepared by the Ministry of Justice does in fact state that «an information request is considered to have been met by the holder of the information who received the request, if the information can be obtained from another source without difficulty and quickly, and the requestor is informed of this». We believe, however, that this norm should be withdrawn from the draft law since it gives a formal excuse for executive bodies to avoid providing information and could thus undermine such an extremely important means of access to information as information requests. Furthermore, given that a considerable part of Ukraine's population lives in rural areas or small towns, in many of which there are no libraries holding these official publications, the local authorities do not have special premises or simply places where those requesting information can work with the documents, and there simply is no access to the Internet, the inclusion of such a norm in the law would adversely affect access to information in Ukraine.

THE INFORMATION REQUESTED CANNOT BE PROVIDED SINCE...

Most of the letters informing of a refusal to provide the information requested began with this phrase or variations on it. With regard to grounds given for not providing the information, the project participants were particularly disturbed by the fact that the addresses refused to provide information which is on open access, and the grounds given did not comply with Article 34 of the Constitution, and infringe the constitutional right of access to information.

Among the reasons given by prosecutor's offices for not providing information requested are the following gems:

♦ It is not within the jurisdiction of the Svitlovodsk inter-district prosecutor's office (Kirovohrad region) to provide information to legal entities in order for them to carry out programmes supported by foreign governments.

♦ The Prosecutor's offices are not part of the legislative, executive or judicial branches of power and therefore are not obliged to provide information in response to the requests set out in Article 32 of the Law «On information» [access to official documents].

♦ In accordance with Article 9 «Every citizen shall be ensured free access to information relating to that citizen, except in cases envisaged by the laws of Ukraine». At the same time, from the content of your letter, it is not clear which specific rights, liberties and legitimate interests the organization which you hear needs the information requested to exercise, or how the information concerns you personally. Therefore your right as a citizen and as the head of the Odessa Regional Branch of the Committee of Voters of Ukraine to receive the information has not been confirmed. Due to this there are no legitimate grounds for providing the information. The issuing of expert assessments to citizens is not foreseen by current legislation.

♦ This information is provided only to high-level bodies of the prosecutor's office.

Some explanations from the prosecutor's office are capable of both depressing and arousing mirth. As mentioned earlier, the prosecutor's office quite often refuses to meet information requests because it is not part of any branch of power. If one follows their line o f thinking further, one could come to the conclusion that the prosecutor's office is not a body of State power since according to Article 6 of the Constitution «State power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power». So, dear citizens, if you, God forbid, are summoned to the prosecutor's office, you can legitimately turn down this «invitation» since the prosecutor's office does not belong to any branch of power.

The same prosecutor's office has also refused to provide information or documents on the following grounds:

♦ Due to the fact that these figures are not foreseen in statistical reporting;

♦ Due to the lack of such information;

♦ The information is confidential;

♦ The information is on restricted access[11];

♦ Documents are not provided on the basis of Article 37.5 of the Law «On information»;

♦ In accordance with Article 37 of the Law «On information»», the information requested is not subject to compulsory access to official documents as per request;

♦ The information sought is information about operational or investigative work of prosecutor's offices and its disclosure could jeopardize operational measures, intelligence or detective work into criminal cases.

In some cases no grounds whatsoever are given for the failure to provide part of the information.

It is interesting that the same information was on some occasions provided and on others withheld for different reasons. Law enforcement agencies, furthermore, are reluctant to provide copies of documents.

The most common reason for not providing information given by divisions of SBU was that the information requested was on restricted access, for example:

1. According to SBU Order No. 245/DSK[12] from 05.11.1999 the statistical data which you have asked for is confidential information;

2. According to Articles 30 and 37 of the Law «On information» the information is on restricted access;

3. Reference to the Cabinet of Ministers Resolution from 27.11.1998 No. 1893 «On approving instructions for the registration, storage and use of documents, cases, publications and other material forms of information containing confidential information held by the State»;

4. Pursuant to Article 20 of the Law «On information» the information and documents which you ask us to send are nor for mass information and cannot therefore be provided.

The MIA refused to provide information on two main grounds: a) because they didn't have the information requested and b) the information was on restricted access.

Divisions of the State Department for the Execution of Sentences explained their refusals to provide information in the following ways:

[11] Although the information requested was that categorized as being on open access

[12] DSK means for official use only [translator]]

1. The information is internal documentation (divisions of the Crimea, the Donetsk, Zhytomyr and Odessa regions);

2. To receive the necessary information the requestor must agree the issue with the State Department for the Execution of Sentences (divisions of the Ivano-Frankivsk and Rivne regions);

3. The regional nature of the activities of the organization (State Department for the Execution of Sentences);

4. The information can only be provided with the consent of the State Department for the Execution of Sentences (Zhytomyr region division);

5. A rather interesting explanation was given by the Donetsk regional division of the State Department. We give their text in full:

*«In compliance with Article 40 of the Constitution we would inform you that the information which you have asked for on the activities of the Donetsk regional division of the State Department, pursuant to Article 38 of the Law «On information» is the property of the Department and of the State. The grounds for the right of ownership of this information are the creation of the given information by the Division and at State expense. In accordance with current legislation «*The owner of information shall have the right to appoint a person to possess, use and dispose of this information, as well as to determine the rules of processing these data and access thereto, along with determination of other terms and conditions relating thereto». *It has been established as a result of the response received that the project you are carrying out is nongovernmental. As a result of this a copy of this project was not presented. We were thus prevented from familiarizing ourselves and studying the given project to check its compliance with current legislation. One can also assume that the given project is aimed at collecting information which according to Article 37 of the Law «On information» is restricted information».*

We thus see that among the listed reasons, there is not one legal argument entitling the State Department for the Execution of Sentences to refuse to provide the information requested.

The central authorities had a very simple way of explaining their refusal to provide information – they said that they didn't have it. And the State Committee on Nationalities and Migration and the State Department on Religious Affairs, rather than responding to the information requests, sent letters with advice to find the information which the requestor was seeking on their official websites.

Judges explained their refusals to provide information in the following ways: by claiming that the information was secret or confidential (19 refusals); saying that statistical data was not available (14 refusals); due to technical impossibility (3 refusals); claiming the need to provide confirmation of the authority of the person making the request (1 refusal). 13% of the letters refusing to provide the information did not give any reason at all.

Bodies of local self-government gave the following explanations for not giving the information:

1. lack of data;

2. technical impossibility of providing the necessary amount of information;

3. That on the basis of Article 8 of the Law «On information» the information demanded is not one of the «Objects of Information Relationships» which the Law covers and which citizens have the right to receive (Kherson City Council);

4. the information is on restricted access;

5. the need to pay 3 thousand UAH for the information.

Analyzing the grounds on which the public authorities and bodies of local self-government refuse to provide the information requested, we established that one of the reasons for unwarranted restriction (that is, violation) of the right of access to information is flawed legislation in this area. For example, according to Article 37 of the Law «On information» «Compulsory access to official documents as per request shall not apply to documents containing: information not to be disclosed pursuant to **other legislative or normative acts**». However Article 34 § 3 of the Constitution stipulates that the exercise of these rights may only be restricted by law. Article 37.7 of the Law is therefore not in line with the Constitution. One should note that it is specifically on the basis of Article 37.7 that law enforcement agencies and the State Tax Inspectorate refused to provide information on request.

The Odessa State Tax Inspectorate [STI] for example justified its refusal to provide information about the number of checks of people involved in business activities, as well as information about whether there is internal procedure for bringing proceedings against personnel of tax offices or the tax police for violations of the law by referring to Article 37.7 of the Law «On information». On the basis of this norm in the Law, the Inspectorate cited Regulations on tax information in the State Tax Service, approved by Order of the STI from 02.04.1999 No. 175 «On approving Regulations on tax information in the State Tax Service of Ukraine», according to which the given information may not be provided. It is interesting that the actual Regulations No. 175 were not published, meaning that in accordance with Article 57 of the Constitution, the given Regulations are not valid at all. The State Tax Inspectorate does not have the right on the basis of these Regulations to refuse to provide information. Yet even were the STI to publish the Order, it would still run counter to Article 34 of the Constitution.

Table summarizing the results for all bodies of power, 2005

Addressee request / marks	Number of information requests sent	Overall number of responses (letters of notification saying that the information could not be provided)	Number of responses to information requests received		Number of letters notifying whether the information could be provided		The number of information requests met	The number of information requests partially met	The number of refusals to provide the information	The number of information requests which received no answer
			Number of replies received on time	Number of replies received late	Within the ten-day time limit	Late				
State Department for the Execution of Sentences	63	46	23	3	9	11	22	4	20	17
Prosecutor's Office	27	22	6	1	5	10	1	6	15	5
MIA	64	48	21	14	2	11	23	12	13	16
SBU	6	4	0	0	1	3	0	0	4	2
The courts	25	23	6	0	3	13	2	4	17	2
The Constitutional Court	1	1	1	0	1	0	1	0	0	0
The National Television and Radio Broadcasting Council	1	1	1	0	0	0	1	0	0	0
The central authorities*	19	19	11	7	0	1	14	4	1	0

* Not including the law enforcement agencies and the Department for the Execution of Sentences

The local authorities and territorial offices of ministries and State departments*	104	71	29	13	12	20	23	19	29	33
Bodies of local self-government	65	54	26	15	4	11	22	19	13	11
The Accounting Chamber	1	1	1	0	0	0	1	0	0	0
Total	376	290	125	53	37	80	110	68	112	86

Table summarizing the results for all bodies of power, 2006

Addressee request / marks	Number of information requests sent	Overall number of responses (letters of notification saying that the information could not be provided)	Number of responses to information requests received		Number of letters notifying whether the information could be provided		The number of information requests met	The number of information requests partially met	The number of refusals to provide the information	The number of information requests which received no answer
			Number of replies received on time	Number of replies received late	Within the ten-day time limit	Late				
State Department for the Execution of Sentences	63	48	30	5	3	10	30	5	13	15
Prosecutor's Office	159	147	47	9	41	50	40	16	91	12
MIA	179	168	86	28	13	45	80	34	54	11
SBU	21	19	9	2	4	4	7	4	8	2
The courts	97	92	66	4	11	13	56	14	22	5
The central authorities*	173	146	86	21	17	22	94	13	39	27
The local authorities and territorial offices of ministries and State departments*	220	192	128	25	23	23	96	57	39	28
Bodies of local self-government	74	62	29	15	11	14	22	22	18	12
The Verkhovna Rada	14	5	5	0	0	0	5	0	0	9
The President and President's Secretariat	17	7	5	1	1	0	5	1	1	10
The Cabinet of Ministers	15	14	7	0	0	7	5	2	7	1
The National Television and Radio Broadcasting Council	3	3	0	2	0	1	2	0	1	0

* Not including the law enforcement agencies and the Department for the Execution of Sentences

The Constitutional Court	1	1	0	0	0	1	0	0	1	0
The Accounting Chamber	1	1	0	0	0	1		0	1	0
Information requests to National Deputies	3	2	0	1	0	1	1	0	1	1
The Kyiv City Directorate of the Ukrainian Postal Service	1	1	1	0	0	0	1	0	0	0
Total	1041	908	499	113	124	192	444	168	296	133

Table summarizing the results for all bodies of power – January – February 2007

Addressee request / marks	Number of information requests sent	Overall number of responses (letters of notification saying that the information could not be provided)	Number of responses to information requests received		Number of letters notifying whether the information could be provided		The number of information requests met	The number of information requests partially met	The number of refusals to provide the information	The number of information requests which received no answer
			Number of replies received on time	Number of replies received late	Within the ten-day time limit	Late				
The Verkhovna Rada	1	1	0	0	0	1	0		1	0
State Department for the Execution of Sentences	0	0	0	0	0	0	0	0	0	0
Prosecutor's Office	3	3	2	0	0	1	1	1	1	0
MIA	3	2	0	0	0	2	0	0	2	1
SBU	2	2	1	0	0	1	1	0	1	0
The courts	27	21	8	1	9	3	9	0	12	6
The central authorities*	3	0	0	0	0	0	0	0	0	3
The local authorities and territorial offices of ministries and State departments*	58	40	38	1	0	1	35	4	1	18
Bodies of local self-government	10	5	3	1	1	0	3	1	1	5
Information requests to National Deputies	4	2	1	0	1	0	1	0	1	2
Total	111	76	53	3	11	9	50	6	20	35

* Not including the law enforcement agencies and the Department for the Execution of Sentences

Table summarizing the results for all bodies of power

Addressee request / marks	Number of information requests sent	Overall number of responses (letters of notification saying that the information could not be provided)	Number of responses to information requests received		Number of letters notifying whether the information could be provided		The number of information requests met	The number of information requests partially met	The number of refusals to provide the information	The number of information requests which received no answer
			Number of replies received on time	Number of replies received late	Within the ten-day time limit	Late				
State Department for the Execution of Sentences	126	94	53	8	12	21	52	9	33	32
Prosecutor's Office	189	172	55	10	46	61	42	23	107	17
MIA	246	218	107	42	15	58	103	46	69	28
SBU	29	25	10	2	5	8	8	4	13	4
The courts	149	136	80	5	23	29	67	18	51	13
The central authorities*	195	165	97	28	17	23	108	17	40	30
The local authorities and territorial offices of ministries and State departments*	382	303	195	39	35	44	154	80	69	79
Bodies of local self-government	149	121	58	31	16	25	47	42	32	28
The Verkhovna Rada	15	6	5	0	0	1	5	0	1	9
The President and President's Secretariat	17	7	5	1	1	0	5	1	1	10
The Cabinet of Ministers	15	14	7	0	0	7	5	2	7	1
The National Television and Radio Broadcasting Council	4	4	1	2	0	1	3	0	1	0
The Constitutional Court	2	2	1	0	1	1	1	0	1	0
The Accounting Chamber	2	2	1	0	0	1	1	0	1	0
Information requests to National Deputies	7	4	1	1	1	1	2	0	2	3
The Kyiv City Directorate of the Ukrainian Postal Service	1	1	1	0	0	0	1	0	0	0
Total	1528	1274	677	169	172	281	604	242	428	254

* Not including the law enforcement agencies and the Department for the Execution of Sentences

JUDICIAL PROTECTION OF THE RIGHT TO ACCESS INFORMATION

Throughout 2006, finding ourselves facing situations when certain state agencies and state officials ignored our information requests or refused to provide us with relevant information without (in our opinion) any reasonable substantiation of such refusal, we filed claims against respective respondents seeking to declare unlawful their:

a) acts of omissions (such as ignoring our information requests),

b) acts (such as ungrounded refusals to grant information requests),

c) in a number of cases, we also sought to declare unlawful the failures to comply with the Law of Ukraine «On Information» requiring that the requesting party be notified in writing (within 10 days) whether the request will be granted or not.

The claims were filed on the basis of part two of Article 55 of the Constitution of Ukraine and the Code of Administrative Proceedings of Ukraine at the place of the plaintiff's residence (stay, location), as required by Article 19 of the Code.

Among the defendants, there were, in particular:

– the President of Ukraine,
– the Secretariat of the President of Ukraine,
– the Chairman of the Verkhovna Rada of Ukraine,
– the Security Service of Ukraine,
– the State Tax Administration of Ukraine,
– the Ministry of Justice of Ukraine,
– the Constitutional Court of Ukraine, and
– the Ministry of Health of Ukraine.

The courts disallowed all our claims, and neither the defendants' «lines of defense» nor the courts' views were particularly different:

– claims to declare unlawful the failure to respond to information requests were dismissed on the grounds that the defendant had allegedly provided a response (as in case No. 2-2589/2005 based on the claim lodged by Mr. O. Severyn against the President of Ukraine). To «prove» this, the defendant presented the court with a photo copy of the letter allegedly sent to the plaintiff and an excerpt of the outgoing mail register (the plaintiff's arguments about the inadmissibility of such «evidence» were disregarded in spite of the evident violation of the principle of the equality of parties).

– claims to declare unlawful the refusal to provide information were dismissed with reference, first, to the fact that the «special law» (such as the Law «On the Constitutional Court of Ukraine») says nothing about the obligation to provide responses to information requests (and appeals) and, second (the most common), to the fact that a certain «letter had communicated relevant explanations to the plaintiff» (i.e. communicated the refusal to provide information, as in case No. 2-a-694/06 based on the claim lodged by Mr. O. Severyn against the Secretariat of the President of Ukraine).

– as regards claims to declare unlawful the failure to provide notice of whether the request would be granted, as required by parts one and two of Article 33 of the Law of Ukraine «On Information», either this law requirement would be simply ignored (as in case No. 2-a-694/06 based on the claim lodged by Mr. O. Severyn against the Secretariat of the President of Ukraine), or it would be asserted that such notices should be given only under specific circumstances (as in case No. 2a-346/6 based on the claim filed by Mr. O. Severyn against the Security Service of Ukraine, see below).

Furthermore, the judges expressed some controversial (to say the least) arguments pertaining to substantive law, such as, for example, the following arguments:

1. The Law «On Citizens' Appeals» is applied to legal relationships governed by the special Law of Ukraine «On Information» and by Article 34 of the Constitution of Ukraine (as in case No. 2-2589/2005 based on the claim lodged by Mr. O. Severyn against the President of Ukraine, in case No. 2-a-694/06 based on the claim lodged by Mr. O. Severyn against the Secretariat of the President of Ukraine, and in case No. 2-a-694/06 based on the claim lodged by Mr. O. Severyn against the Ministry of Justice of Ukraine).

2. The state agency's refusal to provide information is declared lawful with reference to the fact that the special law governing the activities of such state agency does not say anything about its obli-

gation to provide information upon citizens' requests but contains provisions authorizing the agency to make its information public in some other ways (through mass media, etc.), – and, therefore, there is a de facto recognition of this state agency not being subject to the information law proper (as in cases No. 2a-194/5 and No. 22-1250a based on the claims lodged by Mr. O. Severyn against the Constitutional Court of Ukraine).

3. There is a lack of understanding of the hierarchy of legislative acts (or an unwillingness to follow this hierarchy, contrary to the requirements of the Constitution of Ukraine, the Code of Administrative Proceedings of Ukraine, and the available explanations provided by the Supreme Court of Ukraine) (as in case No. 2-a-221 based on the claim lodged by Mr. O. Severyn against the Chairman of the Verkhovna Rada of Ukraine, when an order issued by the defendant was placed above the Constitution, international treaties, and the laws of Ukraine).

We should also mention resolutions, issued by the Golosiyivskyi District Court in Kyiv on May 3, 2006 in cases No. 2a-346/6 based on the claim lodged by Mr. O. Severyn against the Security Service of Ukraine and No. 2a-275/6 based on the claim lodged by Mr. O. Severyn against the Ministry of Health of Ukraine, when in two closely similar situations one and the same judge in the first case dismissed the claim for declaring unlawful the failure to provide the necessary written notice of whether the request would be granted or not («*in the court's opinion, a violation of Article 33 of the Law is possible, when the state agency possesses the requested document at its disposal but refuses to provide it*») and in the second case allowed the claim.

At the same time, in the second case, the court did de facto evade ruling on the merits of the case: «*the matter of the obligation to respond to the merits of submitted requests could not have been resolved, and at this stage it is impossible to conclude whether the defendant does or does not possess the requested information*».

In many cases, the courts' decisions were appealed, but the Kyiv Appellate Court left such appeals without consideration. As of today, case No. 22-1250a based on the claim filed against the Constitutional Court of Ukraine is pending at the Higher Administrative Court of Ukraine, and the recently issued resolution of the Obolon District Court in Kyiv, dated April 17, 2007, in case No. 2-a-221 based on the claim filed against the Chairman of the Verkhovna Rada of Ukraine Mr. O. Moroz has been appealed to the newly established Kyiv Appellate Administrative Court.

In summary, we would like to stress the following points:

1. Judicial protection of citizens' rights to information in their relationships with state authorities and state officials is a problematic issue.

2. To a certain extent this can be attributed to the judges lacking relevant practice.

3. In a number of cases, courts demonstrated a clear bias and/or incompetence.

Therefore, there exists a particular need for developing relevant court practice and enhancing the ability of citizens and human rights defenders to take court actions to protect the right to obtain information about activities of state agencies and state officials.

CONCLUSIONS

In summarizing the results above, the following conclusions would seem warranted.

1. At present in Ukraine the right of access to information is merely declared, yet not guaranteed.

2. Public officials and civil servants treat information as their own property (despite the fact that it is prepared at the taxpayer's expense).

3. Public officials and civil servants regularly breach the time frames stipulated for information requests, especially as regards the period for informing that an information request cannot be met.

4. The norm of Article 34 of the Law «On information» which obliges the authorities where provision of information as per request is to be postponed to notify the requestor of this in writing with an explanation of how to appeal against this decision is not complied with at all.

5. Infringements of the right to information are of a systemic nature and provision of the information or official documents requested in full and within the stipulated time frames are rather the

exception than the rule. Movement therefore towards greater openness as regards information is not significant and it would be too early to speak of any significant changes.

The main reasons for lack of openness from the authorities with respect to information are, in our opinion, the following:

1. The low level of professional training of public officials and civil servants.

2. Lack of knowledge of information legislation.

3. The inability of public officials and civil servants to correctly interpret the norms of the law which results in their faulty understanding of both the letter and the spirit of the Constitution and laws of Ukraine.

4. The lack of a mentality based on information openness among the authorities «as the result of a legacy of a State «of great illusions and rotten morality»

5 The absence of proper legal regulation in the area of access to information, with the Law «On information» and other normative legal acts having significant shortcomings and not complying with international standards for freedom of information.

6. It should be noted that the failure to provide information because it is deemed to be confidential on the basis of Articles 30 and 37 of the Law «On information», as has already been stressed on many occasions, is unwarranted since the above-mentioned norms do not comply with the Constitution nor with international standards in this sphere. We would furthermore draw attention to the fact that the list of items of information with the stamp restricting access «For official use only» [DSK] but which do not constitute State secrets, if they are compiled are not always made public. One thus has the paradoxical situation where we do not have access to official documents providing a list of items of information which are confidential, in other words, we can't know what it is that we are not supposed to know.

VIII. FREEDOM OF EXPRESSION[1]

2006 was characterized by a lack of systematic reforms in the area of freedom of speech and an increase in the number of conflicts between the authorities and the media. A further very worrying trend was the absence of any adequate legal response to incidents where journalists were beaten, attacked or harassed. Criminal proceedings into such incidents were either not instituted, or where they were, the investigation was not carried out efficiently and produced no result.

According to information from the National Television and Radio Broadcasting Council of Ukraine, as of 1 November 2006 in Ukraine there were 1268 television and radio companies (hereafter TRC), of which 647 were television companies, and 524 radio, with a further 97 both television and radio broadcasting.

In breach of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms Ukraine has a permission-based system for registering the print media and information agencies.

The Ministry of Justice during 2006 reviewed 1,893 applications for registration or re-registration of printed media outlets, of which 1,048 with a nationwide or foreign circulation were registered (/re-registered); as well as 11 information agencies. 69 printed outlets had their applications turned down. During the same period, territorial offices of the Ministry registered (/re-registered) 882 printed publications with local circulation.2

Overall in the country there are more than 23 thousand periodical publications, of which 13 are local outlets.

The lack of an electronic register of printed media outlets and information agencies remains a problem. The register of television and radio companies maintained by the National Television and Radio Broadcasting Council i is openly available on the Internet.

1. REVIEW OF CHANGES TO LEGISLATION[3]

For the media 2006 was a year of great expectations and disillusionment, since the much hoped-for radical modernization of legislation regulating the media, freedom of speech and of information failed to materialize.

No changes were introduced to legislation making it possible to find out the real owners of media outlets, especially television channels and radio stations. Nor was effective control imposed over the concentration of media outlets in the hands of one owner or family, nor anti-monopoly restrictions on the information market in accordance with Council of Europe recommendations. The laws «On the procedure for media coverage of the activities of public authorities and bodies of local self-government in Ukraine» and «On government support for the media and social protection for journalists» were not abolished although these effectively create benefits for State-owned media outlets. The Verkhovna Rada proved unable to adopt laws to provide safeguards for the work of

[1] By Volodymyr Yavorsky, Executive Director of UHHRU.
[2] Issues of State registration of printed media outlets and information agencies // Ministry of Justice website: http://www.minjust.gov.ua/0/news/8989
[3] Prepared by Oksana Nesterenko, PhD Student in the Faculty of Constitutional Law of the Yaroslav Mudry [the Wise] National Law Academy.

the mass media, to ensure freedom of information in Ukraine and make the activities of the public authorities more transparent and open to the public. It failed to pass, for example, the Law «On public television and radio broadcasting» (new version); the Law «On information» (new version); the Law «On privatization of media outlets in Ukraine» and others. The President did not heed the criticism from media specialists about the Law «On television and radio broadcasting» from 20 January 2006 nor calls on him to use his power of veto.

If one compares the changes to legislation on the media and freedom of information last year with those considerable, if not always successful, moves in 2005, then the results, both in quantitative and qualitative terms can be described as far more modest. Whereas in 2005 the Verkhovna Rada passed twelve laws in these areas, including six new laws or new versions, and six introducing amendments to existing laws, in 2006 only 7 draft laws reached law stage, and of these two laws only indirectly touch on the media.

The Fourth [pre-election] term of the Verkhovna Rada adopted the following laws:

1) «On Television and radio broadcasting» from 01.03.2006;

2) «On amendments to the Code of Administrative Offences, the Criminal and Criminal Procedure Codes on liability for violations of electoral rights» from 23.02.2006;

3) «On the State Service for Special Communications and Protection of Information» from 23.02.2006.

The Fifth term of the Verkhovna Rada adopted these laws:

1) «On Ratification of the Additional Protocol to the Convention on cyber-crime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems» from 21.07.2006;

2) «On amendments to Article 25 of the Law «On publishing» from 02.11.2006;

3) «On Holodomor 1932-1933 in Ukraine» from 28.11.2006;

4) «On fundamental principles for the development of Ukraine's information society for 2007 – 2015» from 09. 01.2007.

Let us consider whether any of these changes could pose a threat to freedom of speech and information in Ukraine.

The most animated debate among specialists and journalists was over the Law «On Television and Radio Broadcasting». Many specialists believe it to have significant flaws. The main shortcomings and inherent dangers were analyzed in depth in last year's Report «*Human Rights in Ukraine – 2005*». Application of the law has already highlighted the following shortcomings:

– Imperfect procedure for appointing a Head of the National Television and Radio Broadcasting Council of Ukraine [NTRCU] – the current head was not appointed as set down in the law at the submission of parliament. The public council attached to the NTRCU is still not working, although it was created in December 2006 (with the makeup also arousing a lot of criticism.

– Ambiguity with regard to the quotas for domestic production and for those in the Ukrainian language[4], the fact that this was not coordinated with other legislative norms or with international agreements which Ukraine is a signatory to, led to these provisions effectively not being followed.

– The licensing procedure was virtually stopped. According to the law, licensing is carried out only on the basis of an approved Development Plan for the television and radio broadcasting realm. There was no such plan for a long time, and the document which finally emerged bears absolutely no resemblance to a development plan since it lacks simple information about the number of existing radio frequencies used for television and radio broadcasting, or a plan on how these are to be used. Effectively, therefore, there is no development plan, with the plan developed by the Council having been rather to fulfil a formal requirement of the law. In fact, therefore, the licensing procedure remains unpredictable, non-transparent and incomprehensible to those involved in this market.

– Television and radio companies adhered to the formal requirements of the law and approved editorial charters, however this proved yet another profanation since the documents have not be-

[4] A very large number of films, etc are produced in the Russian language, due both to the Soviet legacy and to a large amount of Russian investment. Another problem has been that distributors claimed that they would not recoup the cost of dubbing films in Ukrainian. This led to a very successful civic campaign to show distributors that it would indeed pay (*translator*)

come a means of protecting editorial policy against owners of the media outlet and do not protect journalists. Their content, approved by the owners, establishes declarative provisions echoing general norms of legislation while providing no mechanisms for protection.

– The norm prohibiting foreign legal entities from founding television or radio companies [TRC] has only confused the situation with media ownership, since foreign entities have now simply been transferred to the second generation of owners, or their control has been concealed in some other way. An example of this is the ownership structure of the television channel 1+1, where Central Media Enterprises Ltd, a company well-known in Europe, is not officially registered as one of its owners. Yet the CME website states that the company has a «60% economic interest» in 1+1. This demonstrates the total ineffectualness of such bans and the inability to achieve government policy on medial pluralism.

– The need for serious revision of this law is clear to all.

There was active discussion during 2006 of possible ways of privatizing State and municipal medial outlets, this referring both to the printed press and Internet outlets.

In implementation of Prime Minister's Instruction № 2571/11/1-06 from 3 February 2006 (over the President's Decree of 20 January 2006 No. 39 «On the Action Plan Regarding the Performance of Ukraine's Obligations Pursuant to its Membership in the Council of Europe»), the Ministry of Justice prepared a draft law «On reforms to State and municipal printed media» which was, however, subjected to serious criticism. In April it was presented and first debated, then through the year numerous discussions of the draft law were held in at regional level.

By 29 November, three draft laws prepared by the Ministry of Justice, the Public Council on Freedom of Speech and Information, and the National Union of Journalists, respectively, were awaiting discussion in parliament. The main areas of disagreement are the ways and speed of privatization.[5]

Meanwhile National Deputies A. Shevchenko, S. Kupil and L. Mordovets on 14 December 2006 registered Draft Law № 2738 «On editorial freedom in the State and municipal press during the process of privatization». This, however, has not been considered by parliament (as of 1 June 2007). The draft is a considerable step forward in that process. Acknowledging the difficulties of privatization, the National Deputies propose:

– prohibiting public authorities or bodies of local self-government from becoming the founders or co-owners of media outlets, while the existing media outlets can continue in their present state until new legislation is adopted on privatization of the media;

– establishing guarantees of editorial independence of State and municipal printed media outlets through special procedure for dismissing the chief editors with the consent of the editorial staff; establishing certain guarantees of editorial freedom; and setting out rules of procedure for publishing information from the authorities.

A fundamentally new law was that «On the State Service for Special Communications and Protection of Information» from 23 February 2006. The explanatory note to the Law states: «This draft law has been drawn up in fulfilment of the President's Decree «On observance of human rights during investigative technical operations» from 07.11.05 № 1556/2005 and the subsequent Instruction from the Cabinet of Ministers from 14.11.05 № 59391/1/1-05. These required that proposals be agreed and submitted in the legally established manner to the Cabinet of Ministers on creating a Service for Special Communications and Protection of Information as a central authority with special status. Its main functions will be to implement government policy in the area of protecting State-owned information resources in communication networks; to ensure the functioning of a State system for government communications, a National system for confidential communications, and cryptographic and technical protection of information. The adoption of this law will make it possible to define the functions and powers of the State Service for Special Communications and Protection of Information of Ukraine and to ensure control over its activities in accordance with the Law «On democratic civil control over the Military organization and law enforcement agencies of

[5] Cf. «The main problems privatizing State and municipal printed media outlets were discussed at hearings organized by the Committee on Freedom of Speech and Information» // The Information Department of the Verkhovna Rada from 29.11.2006 (in Ukrainian) http://portal.rada.gov.ua/control/uk/publish/article/news_left?art_id=80965&cat_id=37486.

the country», as well as by the President and Verkhovna Rada. The creation of a State Service for Special Communications and Protection of Information is carried out as part of the reform of the Security Service of Ukraine [SBU] in order to free the latter of inappropriate functions».

However it is not all so upbeat if one looks at the Law within the context of Ukrainian reality since, as Friedrich the Great stressed, bad laws are not bad in the hands of good enforcers and vice versa: when the enforcers are rotten then even the best laws are harmful. The question arises: will this newly created central authority with special status not become an instrument for wiretapping and surveillance by the authorities over those dissident voices?[6]

We consider, furthermore, that certain provisions of this law will encourage unlawful restriction of access to information on the activities of the public authorities and bodies of local self-government.

For example, one of the main functions of the State Service for Special Communications and Protection of Information is «*to take part in forming and implementing government policy on protecting State-owned information resources*». According to Article 1, State-owned information resources are to be understood as «*information held by the State, the need to protect which is defined by legislation*». However human rights organizations have on a number of occasions pointed out that restriction of access to information, in accordance with Article 34 § 3 of the Constitution can be imposed by a law, and not by legislation[7] Furthermore only individuals or nongovernmental legal entities may possess confidential information since according to Article 19 of the Constitution «Bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine». This means that they cannot impart information at their own will and under conditions they have set down. Yet Ukraine's only legislative body has not only failed to bring Articles 3 § 7, 30 § 3, and 46 § 2 of the Law «On information» into line with international standards and Article 34 § 3 of the Constitution, but have actually exacerbated the discrepancies by adding the concept of «State-owned information resources» to the Law «On the State Service for Special Communications and Protection of Information».

One can with justification assume that hiding behind the need to protect State information resources, the State Service for Special Communications and Protection of Information will in fact restrict access to information of public importance.

Another law which could adversely affect access to information is the law «On the Cabinet of Ministers» passed on 21 December 2006. According to Article 3 § 4 of this law, «all decisions of the Cabinet of Ministers must be made public except for acts containing confidential information.» This is despite the fact that in accordance with Part VII § 2 of Recommendations No. 2 made by the Council of Europe's Committee of Ministers «On access to official documents», «If a limitation applies to some of the information in an official document, the public authority should nevertheless grant access to the remainder of the information it contains...» The given provision does not, therefore, comply with international standards on freedom of information since it is the specific information which should be kept secret and not the entire document. Furthermore, one can assume that the acts which contain information on restricted access will at the same time define people's rights and duties and Article 57 § 3 states that «Laws and other normative legal acts that determine the rights and duties of citizens, but that are not brought to the notice of the population by the procedure established by law, are not in force». Thus, as well as ignoring international standards, Article 3 § 4 also runs counter to a fundamental principle enshrined in the Ukrainian Constitution.

Journalists reacted with some wariness to the Law «On amendments to the Code of Administrative Offences, the Criminal and Criminal Procedure Codes on liability for violations of electoral rights» adopted just prior to the parliamentary elections. The Law envisages sanctions for infringing procedure and restrictions on pre-election campaigning, as well as during the preparation for and holding of a referendum with the use of the mass media. There are also sanctions for preparing or

[6] See also the analysis of this Service in the unit on the right to privacy.

[7] The rather inept translation of the above is to endeavour to retain the author's distinction. The Constitutional norm cited states: The exercise of these rights may be restricted by law in the interests of national security.» The word used here is zakon – «a law», whereas the word used in the definition of State-owned information resources is zakonodavstvo – «legislation» (*translator*)

disseminating printed pre-election campaign material which does not contain information about the printing outlet, its print run, details about the person responsible for the issue and the rules of procedure for including campaign material or political advertisements or posting them in places prohibited by law. Specialists from the Institute for Mass Information mention the following: «One should note that some articles impose liability for actions which are not prohibited by the law on the elections. For example, Article 212-9 of the Criminal Code imposes liability for «giving an advantage in information television or radio broadcasts, or in the printed press, to any candidate, political party (bloc), their pre-election programmes by the owners, officials or staff, or creative employees of a media outlet».

Not everybody was happy with the Law «On Holodomor 1932-1933» [the Famine] since according to Article 2: «Public denial of Holodomor 1932-1933 in Ukraine is an affront to the memory of the millions of victims of Holodomor, denigration of the dignity of the Ukrainian people and is unlawful». The law could thus be legal grounds for establishing future administrative and / or criminal liability for denial of Holodomor 1932-1933» Some politicians and journalists asserted that this constituted restriction on freedom of speech. One cannot, however, agree with such an argument. After all, in many countries of the European Union, for example, Germany, Austria, France and Belgium, denial of the Holocaust is a crime and in 2006 the French parliament also made it a crime to deny the genocide of the Armenian people under the Ottoman Empire during the First World War. The given law only establishes historic justice and should in no way be considered a way of stifling freedom of speech.

A clear distinction between freedom of speech and propaganda of hatred, discrimination or violence against any individual or against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion is established by the Law «On Ratification of the Additional Protocol to the Convention on cyber-crime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems». The ratification of this Protocol creates a legislative guarantee for the protection of such universal values as tolerance, freedom and respect for the rights of others and was an unquestionably positive event in 2006. However other legislation needed to implement these norms was not adopted. The Law does not, for example, stipulate the grounds and extent of liability for such actions.

There was a complicated story with the adoption of the Law «On fundamental principles for the development of Ukraine's information society for 2007 – 2015» Passed at the beginning of 2006 by the fourth session of the Verkhovna Rada, the law was vetoed by the President because the fundamental principles of government policy with regard to introducing and extending the use of automated systems [informatizatsiya] had also been envisaged in the Laws «On a national programme of informatization» and «On a Strategy for a National programme of informatization». The Law «On fundamental principles for the development of Ukraine's information society for 2007 – 2015» was adopted a second time by the fifth [post-election] session of the Verkhovna Rada on 19 January 2007. It would be difficult to disagree with those specialists in the information sphere who say that the law is of a declarative nature.

The law gives a definition of information security, stipulates the principles which those drawing up information legislation should be guided by. It should be noted that the law has reanimated the idea of a need for drawing up and adopting an information code. It envisages that such a code would contain sections on the principles of electronic trading; legal protection of the content of computer programmes; improved protection of intellectual property rights, including authors' rights when placing and using works on the Internet; protection of databases; distance learning; telemedicine; provision by public authorities and bodies of local self-government of information services via the Internet to individuals or legal entities; commercial secrets, etc. On the basis of the proposed concept for an information code, one can thus conclude that its main aim will be to regulate information relations of a private nature and will not touch on issues of access to information about the activities of public authorities and bodies of local self-government. In view of this, the use of the term «code» would seem strange, as is the trend towards regulating privacy.

In addition, some National Deputies, main representing the Party of the Regions, have proposed that parliament reinstate criminal liability for defamation, this not being in accordance with

standards of the Council of Europe and OSCE on freedom of speech. Parliament has, however, not begun reviewing this issue.

2. OBSERVANCE OF THE RIGHTS OF JOURNALISTS AND THE MEDIA

Regrettably, it must be stated that 2006 was not a year of achievements for the government as regards media and journalists' rights. One should particularly stress violations of freedom of speech and press freedom at local level.

Generalized data on infringements of media and journalists' rights

Type of infringement	2002	2003	2004	**2005**	**2006**
Journalists killed or missing	3	4	0	0	11
Arrests and detentions	–	–	8	2	0
Beatings, assault, intimidation	23	34	47	24	14

KILLINGS, BEATINGS AND OTHER FORMS OF PHYSICAL VIOLENCE AGAINST JOURNALISTS

There were no cases during the year where journalists were killed, however there was one unexplained disappearance. Overall, according to figures from the Institute of Mass Information, at least 14 journalists suffered physical assault or harassment during the year. Most cases of physical pressure on journalists were recorded during the elections to the Verkhovna Rada in March 2006. One should however note that the majority of these cases were probably more methods adopted by individual regional politicians or organized criminal gangs.[8]

It must be noted that 2006 did not bring conclusions to most of the prominent cases involving murdered journalists.

The murder of Georgy Gongadze remains unsolved. Endless court hearings which began in January 2006 have continued into 2007. At these hearings a huge number of witnesses are giving testimony, countless items of material evidence are investigated and various scenarios for the course of events are considered. It all appears, however, more like a trial for the sake of a trial, than a real attempt to solve the case. It was not for want of a reason that the Secretary General of the Council of Europe Terry Davis said that the CE's greatest disappointment had been over the lack of real progress in solving Gongadze's murder and that this would adversely affect Ukraine's reputation abroad.

There has been no significant progress into the investigation of the killing of Volodymyr Yefremov[9]. Procrastination in the criminal investigation has led to delays in submitting the case before the court. A considerable delay was caused in 2006 due to the carrying out of yet another forensic examination.

The single high-profile case which resulted in a court verdict was that into the death of Ihor Aleksandrov[10]. After more than six months of court hearings, the Luhansk Regional Court of Appeal convicted 5 men of involvement in the killing of the journalist and sentenced them to periods of between 2 and 15 years imprisonment. Ihor Aleksandrov's family was also awarded compensation of 400 thousand UAH. In June 2007 the Supreme Court upheld the original sentences.

Incidents involving physical coercion of journalists have continued. One of the most notorious examples was that of the beating by National Deputy from the Party of the Regions faction Oleh Kalashnikov of journalists from TV Channel STB. The incident became the subject of a review by Deputies at a plenary session of the Verkhovna Rada which resulted in a Temporary Commission being created on the obstruction of the journalists' professional activities.

[8] Country report on Human Rights Practices in Ukraine – 2006: http://www.state.gov/g/drl/rls/hrrpt/ 2006/78846.htm
[9] The Dnipropetrovsk journalist died in 2003 in an extremely suspicious car accident. (*translator*)
[10] Ihor Aleksandrov had written a lot of hard-hitting articles about Donetsk politicians and about corruption in the law enforcement agencies. He was murdered in 2001. (*translator*)

It should be mentioned that the Pechersky District prosecutor's office is carrying out a criminal investigation initiated on 14 July 2006 over obstruction of a journalist's legitimate professional activities with respect to the STB journalists Sytnyk and Novosad. However the pre-trial investigation into this criminal case has still not ended and it is most likely that it will never be concluded for a number of political and legal reasons. The STB journalists recognized as victims in the criminal case explained that on 12 July they were at a political rally at the invitation of the Party of the Regions. After taking an interview from Kalashnikov, they walked through the tent city towards people who were receiving vouchers to get food. Kalashnikov came up to the journalists and asked them to stop filming saying that they were in a Party of the Regions area. The journalists showed him their Verkhovna Rada accreditation and the Party of the Regions invitation. An acrimonious dialogue ensued which the cameraman began filming. Oleh Kalashnikov realizing that they were being filmed began demanding the video cassette. When the journalists refused to give it to him, he grabbed the cameraman by his T-shirt, and pulled him towards him. At that moment some of those with the Deputy tried to pull the cameraman's video recorder away from him, others dragged the woman journalist away from the cameraman who was hit with something on the head and the cassette was taken out of the video recorder.[11]

The Verkhovna Rada passed a Resolution on the case in which they condemned Oleh Kalashnikov's behaviour however they did not state that the behaviour bore the hallmarks of obstruction of a journalist's professional activities.

National Deputy Dmytro Shentse who is also in the Party of the Regions faction on 3 June 2006 beat a cameraman Andriy Avdoshin for filming him during a session of the Kharkiv City Council. The law enforcement authorities refused to initiate a criminal inquiry maintaining that there were no elements of a crime.

One must also mention the case involving the Chief Editor of the newspaper «First Crimean» and correspondent for the France Press Agency Liliya Budzhurova. On 1 March 2006 there was an arson attempt on her home. According to Ms Budzhurova, during the night into 1 March, around 1.15 a.m. petrol was poured over he doors to the garage of her home.

«They virtually set fire to my home since the garage is in the basement. I was at work when it happened, and the car wasn't in the garage. They poured petrol over the doors of the garage counting on it busting into flames and causing the car to explode, and the family would have been sent up in smoke», she recounts. She added that members of her family who were in the house at the time had seen the flash, and had been able to put it out in time.

Budzhurova links this incident with her professional activities. *«It was a clear arson attach. Since I don't have any personal enemies, and I'm not a businesswoman or a politician, this can only be connected with my work».*

She says that in the last issue of her newspaper they had published a list of names of candidates for the post of Crimean Deputy who according to police records had criminal records. «We were the only Crimean newspaper who published the list», she said.[12]

The Central Department of the Crimean MIA launched a criminal investigation into the arson attack on Liliya Budzhurova's home on 1 March. However the case did not result in a court case although in October 2006 testimony was taken from the driver of a Crimean parliamentary deputy O. Melnyk which stated that the latter had issued an order to an unidentified person to «teach the journalist a lesson» for her article in the newspaper «First Crimean». However O. Melnyk himself was released after the Prosecutor General terminated proceedings into the case.»[13]

Yet another incident was linked with the Chief Editor of the Publishing House «Stolichniye Novosti» [«Capital news»] Volodymyr Katsman. He was assaulted on 8 April 2006 at around 8 in the evening. The assailants waited for him in the entrance to his block which has a lock with a code. They beat him with wooden bats. «They didn't take money or my passport, or my leather bag and Swiss watch», Mr Katsman told MiGnews.com.ua. Katsman was taken to the neurosurgery section of a Kyiv hospital with numerous injuries to his head and arm.

[11] Transcript from the plenary session of the Verkhovna Rada from 19 December 2006 http://portal.rada.gov.ua/
[12] «Freedom of speech barometer for March 2006» // Institute of Mass Information http://imi.org.ua
[13] Country report on Human Rights Practices in Ukraine – 2006: http://www.state.gov/g/drl/rls/hrrpt/2006/78846.htm

Publisher of the newspaper Vadim Rabinovych stated that the assault on Katsman was linked with the latter's criticism of anti-Semitic publications of the Interregional Academy of Personnel Management [MAUP]. Mr Katsman told a correspondent from the Institute of Mass Information that during the first two weeks the police had kept him informed about the course of the information, but since then there had been no information.[14]

On 3 June in Kherson the home of Serhiy Yanovsky, journalist from the newspaper «Kievskiye vedomosti» [«Kyiv news»] was set alight. Petrol was poured into the window of the flat from an upper floor, and blocked the doors to the flat with a bar.[15] *Serhiy Yanovsky is well-known for his sharply critical articles in the central and local press about public officials of the local authorities and the head of the law enforcement agencies.*

In August 2006 two assailants beat Ihor Mosiychuk, the editor of the weekly «Vechirny Vasylkiv» [«Evening Vasilkiv» following articles in the newspaper about public officials linked with the distribution of land in the area.

We would stress that journalists from Internet publications also suffered from attempts at physical pressure. For example, on 26 June 2006 Serhiy Romanenko, editor of the Internet publication «Reporter» was hospitalized after being beaten up. He was found unconscious in the city centre. It is worth noting that he is the author of a number of publications about the activities of leading politicians in the country, in particular the Mayor of Uzhhorod. A few days before this attack, the site had published hard-hitting material about the aspirations and attempts of the Mayor Serhiy Ratushnyak to strengthen his influence in a number of local organizations and political parties, including the Socialist Party and BYuT [the Bloc of Yulia Tymoshenko, etc.[16]

As mentioned previously, there was one disappearance recorded in 2006 which may or may not be linked with the journalist's professional activities. On 20 February 2006 journalist from Anatoly Kachurynets from the Striy newspaper «Homin Voli» («Sound of Freedom») left home and never returned. Although the journalist ran the newspaper section on criminal activities, the police say that there is no evidence that the disappearance was linked with his professional activities. The Western Information Corporation (an Internet publication) wrote that according to some reports, Mr Kachuryents had left a note for his wife. The latter has refused to discuss the disappearance.[17]

In 2006 a number of cases were also reported of harassment of journalists or members of their family, with this being directly linked with their journalist activities. One example would be the threats against the life of the editor of the Luhansk newspaper «Serdyta gazeta» [«Angry newspaper»] S. Sorokin, made after he was savagely beaten by three men unknown to him in 2005. Sorokin believes that these threats were linked to the fact that the main feature of the next issue of the newspaper was to be about a bribe of half a million UAH allegedly taken by a Luhansk official.[18]

CENSORSHIP AND OTHER FORMS OF PRESSURE EXERTED ON THE MEDIA

In May 2006 journalists from the newspaper «Za vilnu Ukrainu» [«For a free Ukraine»], which had been coming out irregularly for a while, made a public statement in which they said that the suspension of issue of the newspaper was linked with the political motives of Lviv politicians.

At the end of October, following the death of the head of «Ecolan» (who had invested in the newspaper) some «interesting people» turned up at the editorial office. They offered shares to the newspaper staff at a good price. The shares were bought by Volodymyr Oliynyk, a resident of the Ivano-Frankivsk region and employee of the oil refinery at Nadvirne. He assured them that the newspaper would work as normal and that the entire editorial team would be working on it. However this was a stand in and the real owner was to turn up soon afterwards.

[14] «Freedom of speech barometer for April 2006» // Institute of Mass Information http://imi.org.ua
[15] Unidentified individuals have set fire to the flat of «Kievskiye vedomosti» journalist Serhiy Yanovsky // Institute of Mass Information http://imi.org.ua
[16] Editor of the website UA-REPORTER.COM beaten up // Institute of Mass Information http://imi.org.ua
[17] A journalist has disappeared in Striy, in the Lviv region // http://www.telekritika.kiev.ua/news/146/0/18133/v_striju_na_lviv%D1%89ini_znik_zhurnalist/
[18] «Freedom of speech barometer for January 2006» according to a reform from «Skhid-info» [«East – info»] // Institute of Mass Information http://imi.org.ua

The editor Olha Osoba soon left the newspaper. Yury Shveda began coming to the editorial office. He was at the time working on the image of the candidate for National Deputy Petro Dyminsky (party «Eci+25») and mayoral candidate Bohdan Fedoryshyn (also from «Eco+25»). He brought in a new editor – Yevhen Hutzul. According to the journalists, Hutzul began immediately, on behalf of Dyminsky, issuing instructions to «do a hatchet job» on the Governor of the Lviv region Petro Oliynyk and the mayoral candidate Andriy Sadovy. This was February 2006. When it became clear that the party «Eco-25» would be defeated at the elections, the editor, as member of that party, according to the journalists told them behind the scenes that the newspaper needed to be «sent packing». In March it became a weekly. At the same time (17 March), Dyminsky's friend and partner both in business and politics, Bohdan Fedoryshyn died in mysterious circumstances. The newspaper's staff appealed to the President and government bodies to check out the information in their statement and see whether there had been any unlawful actions by the owner.[19]

The Head of the Lviv Regional Council Mykhailo Sendak publicly put pressure on journalists from the regional television company «Lviv TV», demanding access to broadcasting time. He also demanded that the television company take programmes off air.

At the same time in the Ivano-Frankivsk region, editors of city and district newspapers are concerned about pressure on freedom of speech exerted by the local authorities. They spoke of this in a statement «Freedom of speech cannot be stifled!» issued by the region's city and district newspapers that have district councils and district administrations among co-founders of their outlets.

The statement reads: «Pressure from the authorities on freedom of speech in the Ivano-Frankivsk region has taken on a new form. After flagrant interference by officials in the editorial policy of the newspapers «Kolomiysky visnyk», «Zlahoda» (Tlumach), «Dzdony Pidhirya» (Kalush), an assault against freedom of speech has been made in Kosiv also. The local lords – the heads of the district administration and district council – have imposed censorship in the district newspaper «Hutsulsky krai». They have prohibited the editor from publishing appeals to deputies which are supposedly defamatory, or undermine the authority of the local public bodies, and have thus infringed the Constitution and Ukrainian laws on the media.»

On 23 May 2006 the editor of the newspaper «Hutsulsky krai» Petro Havuka, as well as making public the statement of protest from other journalists, announced a preliminary hunger strike in protest against encroachments on freedom of speech. This was suspended the following day.[20]

Another example of censorship, this time by the management of «Radio Crimea» was alleged by Andriy Ivashko and Serhiy Mokrushin, the authors and presenters of the only youth programme on State radio «Budmo»» [more or less «Cheers!»] which is broadcast in the Ukrainian language. According to their statement made public in April 2006, on Thursday 30 March 2006, at the initiative of the chief editor of the department for broadcasts, R. Semenya, the acting Deputy General Director of the State television and radio company «Crimea» for radio broadcasting E. Rezevych took off the air material which Andriy Ivashko and Serhiy Mokrushin had prepared on the elections in Ukraine and Belarus. Since there proved to be nothing available to replace the feature removed, that programme of «Budmo!» went on air in a shorter version.

Pressure was also exerted on printed outlets via the tax authorities. As an example one can cite the pressure on the «Holding Company «Blitz – Inform» which publishes the popular business weekly «Business» which on many occasions has criticized the position of the tax authorities with respect to some aspects of running a business. On 26 January 2006 the State Tax Administration announced the head of the supervisory council of «Blitz – Inform» Serhiy Melnychuk wanted for questioning.

According to a report from the tax administration, the investigation department of the Kyiv tax department is carrying out a criminal investigation into alleged tax evasion by the head of the «Blitz – Inform» council Serhiy Melnychuk. Melnychuk himself did not appear to give evidence. However according to the General Director of «Blitz – Inform» «at the present time the investigation against Serhiy Melnychuk has been terminated and the persecution against him by the tax [police] stopped». The General Director of «Blitz – Inform» maintains that the criminal investigation

[19] «Freedom of speech barometer for May 2006» // Institute of Mass Information http://imi.org.ua
[20] Ibid.

against Melnychuk and the persecution by the State Tax Administration of the holding company are linked with critical publications directed at the tax authorities in the newspaper «Business», as well as with the topic of «monopolization of the printing market».[21]

OBSTRUCTION OF JOURNALISTS IN THEIR WORK

Cases continued in 2006 where journalists were obstructed in carrying out their work. This was seen, for example, in demanding that journalists get permission for filming public places where there should be no such permits, or in journalists not being allowed to press conferences and meetings of the public authorities and bodies of local self-government.

This can be illustrated by the situation where journalists were not allowed to attend sessions of the Crimean Parliament. *This State body passed a resolution to hold the first session behind closed doors, without journalists' presence. 68 out of the 98 deputies presented voted for the resolution. The proposal had come from one of two initiative groups at present in the Crimean Parliament, whose members are representatives of the Bloc «For Yanukovych!», the opposition Bloc «Ne tak!» [«Not so!»], the party «Soyuz» [«Union»] and the Bloc of Nataliya Vitrenko.*

Deputy from the Bloc of Yulia Tymoshenko spoke out against this: «The Regulations (of the Crimean Parliament) do not have higher force than the Law on information», he stated. At the same time, the representative of the legal service of the Crimean Parliament supported the removal of the journalists. «I would ask all outsiders to leave», representative of the Bloc «For Yanukovych!», Serhiy Tsekov announced.

According to the Prosecutor for the Autonomous Republic of the Crimea Viktor Shemchuk, the attempt to remove the press was unlawful. The Prosecutor stressed that holding parliamentary sessions behind closed doors is possible only during discussions related to national security or State secrets. «The election of speaker to the Crimean parliament is not a secret and such a decision was unwarranted».

After the break, the Head of the Crimean Election Committee Mr Kondratenko invited the press to take their places in a specially designated part of the parliamentary hall..[22]

After this case, on 7 December, the Speaker of the Crimean Parliament A. Hrytsenko introduced illegal restrictions on the number of journalists accredited which led to a protest action by more than fifty Crimean journalists. Following this, the accreditation rules were again eased, with each media outlet being allowed to have two accredited journalists, and with other limitations on sources for receiving information and rulings for filming in parliament being changed.

The Mayor of Donetsk Oleksandr Lukyanchenko without any warning on 11 September restricted journalists' access to the City Council meeting.

One could also cite the situation which arose in the Ivano-Frankivsk City Council. The Deputies there in May 2006 granted the Mayor's press secretary the exclusive right to decide at his own discretion whether or not to admit journalists to council meetings. During a discussion of new regulations for the city council, the proposal was initially to give journalists accreditation for the meetings. Instead of this, the right was set out for the press secretary to deprive reporters of their accreditation. The formal grounds could be an infringement by the press representative of legislation. For the first time in the city the risk arose that a list «of chosen» would emerge. According to the regulations, there are no clear criteria for accreditation, it will be carried out according to the wishes of those holding electoral office.[23]

There were a lot of cases reported during the elections on interference in journalists' work. For example, in March 2006, Edward Bubnyak, Secretary of the Lviv City Territorial Electoral Commission threw a journalist from «Hal-infor» out, maintaining that journalists wishing to cover the work of the Commission needed to have extra documents confirming identity and that a journalists' pass was not serious enough. However he was unable to justify his decision through any legislation. He added that he didn't want «all and sundry» turning up at the Commission. On 25 March the City Electoral Commission refused to provide «Hal-info» journalists with a list of candidates for the

[21] «Freedom of speech barometer for January 2006» // Institute of Mass Information http://imi.org.ua
[22] «Freedom of speech barometer for January 2006» // Institute of Mass Information http://imi.org.ua
[23] Ibid.

city council or the list of mayor candidates. Oleh Shcherbakov, in explaining his actions said that he had even sacked a clerk of the Commission for giving out such information to journalists.[24]

INTERFERENCE IN THE WORK OF THE MEDIA AND OF JOURNALISTS

A whole string of incidents took place during 2006 involving pressure from the local authorities on municipal media outlets. There was especially fierce confrontation in cases where the position of the media organization differed from that taken by the authorities, with measures of both political and economic pressure being applied. Measures included unlawfully dismissing directors of particular municipal outlets; interference in editorial policy; stripping the organization of premises which the authorities had previously let to them; hold-ups in paying salaries; reduction of royalties for writing answers, etc. One of the catalyzing forces in this was the process of privatizing State-owned and municipal media outlets, with this process also being one of the main areas of discussion on the media market.

Most municipal printed outlets are in the Donetsk, Odessa, Dnipropetrovsk and Luhansk regions. Figures for the amounts of budget funding for municipal printed press outlets are also telling. The media in Donetsk receives the most financial support (over 11 million UAH), the Kharkiv region (over 9 million UAH), Kyiv (8 million UAH, the Vinnytsa, Dnipropetrovsk and Odessa regions (over 4 million UAH), and the lease support in the Rivne, Sumy, Zhytomyr regions, as well as Sevastopol (less than 1 million UAH.[25]

In regional terms, it is in the eastern and southern regions that freedom of speech continues to experience the greatest restrictions. However such cases did become more frequent in the West of the country, in particular in the Ivano-Frankivsk region. By means of so-called editorial policy the necessary material is selected, this usually containing one point of view or criticism exclusively of political opponents. In conditions of greater control, the media outlets become a mouthpiece for convenient political propaganda, and not a place for public discussion.

One can cite as an example the municipal television company «Kyiv» which was under constant pressure from the city state administration during 2006. The confrontation took any number of different forms: change of management; bans of broadcasting particular programmes and others. Another form of pressure was through suspending financing. For example, in April the financing department of the Kyiv City State Administration blocked the television company's accounts without giving any grounds for this.

In May 2006 the Mayor of Kyiv Leonid Chernovetsky effectively without any grounds dismissed Valeria Tkachuk from her position as Director of the municipal television company «Kyiv» in connection with the termination of her powers. Prior to this, in April and virtually immediately after Chernovetsky's election as Mayor, Tkachuk was temporarily suspended from her duties pending the results of an internal inquiry into allegations of improper fulfilment of her official duties. In May she filed two civil suits, one calling for her dismissal to be declared unlawful, and the other over her suspension during the official inquiry. In January 2007 the Obolonsky District Court in Kyiv found that Ms Tkachuk's suspension had been unlawful, and on 2 April the same court ordered the Mayor to reinstate her as Director, ruling that her dismissal had been unlawful.[26]

Yet another example was the conflict between the staff of the Chernihiv municipal television company «Prypuky» and the newly-elected Mayor Yury Berkut. According to the «Prypuky» journalists, the Director of the television company Valery Doroshenko was forced by the Mayor to resign. In connection with this the journalist team of the company stated that they were categorically against the measures the new authorities were using in building relations with journalists and the media.

At a meeting of the «Prypuky» team on 17 April, the journalists decided to ask the Mayor to retain Valery Doroshenko in his post as Director of the company which they believed their were no grounds for his forced resignation.

[24] «Freedom of speech barometer for March 2006» // Institute of Mass Information http://imi.org.ua
[25] Information from the State Committee on Television and Radio Broadcasting on the amounts of budgetary support for municipal printed media outlets: available on the Committee's website http://comin.kmu.gov.ua
[26] Chernovetsky loses a civil suit to Tkachuk // www.korrespondent.net from 02 April 2007.

«We view this as a case of pressure on a media outlet and its manager which runs counter to legislation, as well as to the principles of freedom of speech and press freedom, proclaimed by the President, the Verkhovna Rada and the Cabinet of Ministers, as well as the political parties and blocs which were successful at the parliamentary elections on 26 March this year», their statement read. The journalists also pointed out the critical material state of the television company and the impossibility of working under such conditions.[27]

PROPORTIONALITY OF PUNISHMENT FOR ABUSE OF FREEDOM OF SPEECH

It remains common practice to impose disproportionate penalties for abuse of freedom of speech, the dissemination of untruthful information, etc. Sometimes these penalties are imposed for expressing value judgments. They have, moreover, been use as a form of pressure on media outlets and journalists. It should, however, be mentioned that the courts often apply European Court of Human Rights case law in such instances which has a positive impact on the resolution of these disputes.

In the first half of 2006 there were 4.6 thousand civil defamation suits defending honour, dignity and business reputation awaiting examination by the court, this being 21.9% more than for the analogous period in 2005. The claims were allowed in 750 cases, or 56.9% (against 55.5%) of those where a judgment was handed down, with 2 million 35 thousand UAH awarded in damages. This included 614 claims against media outlets, which was also 32.0% higher. Judgments were issued in 168 claims, of which in 97 cases, or 57.7% (against 55.5%) the claims were allowed, with damages awarded amounting to 276.9 thousand UAH. This increase is most likely to have been due to the pre-election campaign which was marked by an escalation in the amount of untruthful information disseminated about politicians in order to discredit them. On the other hand, we see a clear and significant reduction in comparison with previous years both in the number of claims against the media and individual journalists, and in the amounts of moral damages awarded.

With respect to pressure via civil claims, mention should be made of the pressure exerted upon the newspaper of the Luhansk regional branch of the Ukrainian Committee of Voters «Third Sector» which faced a number of such court cases. The «author» of the latest suit presented in May 2006 was the Deputy Mayor of Severodonetsk Serhiy Porkuyan who estimated his moral suffering at 10 thousand UAH.

«The claim was lodged over the publication in a March issue of the newspaper of an interview with candidate for the office of deputy of the regional and city councils Volodymyr Bezymyanny. The latter state that such deputy mayors as Porkuyan need to be changed and added his opinion as to why this needed to be done», the head of the Luhansk Committee of Voters Oleksy Svyetikov explained.

Porkuyan decided that Bezymyanny's remarks were not a value judgment, but the dissemination of untruthful information, in particular, because he had not been charged with bribe-taking, and therefore nobody had the right to consider him to be such.

We would mention that for the editorial office of «Third Sector» this is already the seventh defamation suit, six of which came from one address which houses the Severodonetsk executive committee.[28]

The Mayor of Donetsk Oleksandr Lukyanchenko lodged a claim on 3 October against the newspaper «Public truth» over their publication of caricatures of him.

Speaker of the Verkhovna Rada Oleksandr Moroz also filed numerous suits against the printed press and Internet sites over critical publications about him and his activities.

On 29 November the Mayor of Ladyzhyn in the Vinnytsa region Valery Kolomiytsev lodged a damages claim of 100 thousand UAH against the Editor of «Ladyzhynska gazeta», Ludmila Holovashych..

In a judgment issued on 26 January 2006[29] a panel of judges of the Supreme Court Civil Chamber revoked the previous court rulings on the civil claim brought by the limited liability company

[27] «Freedom of speech barometer for April 2006» // Institute of Mass Information http://imi.org.ua
[28] «Freedom of speech barometer for Mayl 2006» // Institute of Mass Information http://imi.org.ua
[29] «Supreme Court Herald» [«Visnyk Verkhovnoho Sudu] № 3, 2006.

Eural Trans Gas against Global Ukraine Ltd and the journalist Oleh Yeltsov, and returned the case for new examination by a court of first instance.

Back in October 2004, A.K.[30]and Eural Trans Gas filed a suit against Global Ukraine and Yeltsov in defence of honour, dignity and business reputation and demanding moral compensation. They based their demands on the fact that the Internet publication «Ukraina kriminalna» [«Criminal Ukraine»], at the time owned by Oleh Yelsov, and the provider Global Ukraine, had, on 18 August 2003, posted on his website an article under the title «Naftohaz of Ukraine: A Study of financial corruption. Part 2». The claimants asserted that the article contained information which was not true and that it infringed the rights and legally protected interests of A.K. and Eural Trans Gas.

The Pechersky District Court in Kyiv in a ruling from 28 February 2005 partially allowed the claim, finding that the information in the article, published on 18 August 2003 on the Internet site was not true. It ordered Yeltsov at his own expense to refute the wrong information on the site http://www.cripo.com.ua (which by that stage no longer belonged to him and in the newspaper «Uryadovy kuryer» [«Government Courier»]. Yeltsov was also ordered to pay A.K. and Eural Trans Gas 25 thousand UAH each in compensation for moral damages. The court rejected the claim by A.K. and Eural Trans Gas against Global Ukraine.

In its ruling on 3 June 2005 the Kyiv Court of Appeal revoked the part of the district court's ruling ordering Yeltsov to refute the wrong information used in the article posted on the website in the newspaper «Uryadovy kuryer». The Court of Appeal, however, upheld all the rest of the first instance court's ruling.

Yeltsov maintained that the information at issue about the claimants had already been posted on the website of Radio Free Europe / Radio Svoboda [Radio Liberty]. The author of the article – K. was a Radio Svoboda analyst, and that Global Ukraine and Yeltsov bore no blame for disseminating wrong information. Furthermore, according to Article 42 of the Law «On Printed Mass Communication Media (the Press)» the media and journalists may not be held liable for compensating moral (non-material) damage for publishing or distributing information which is not truth, if the latter is contained in official reports, or was obtained from information agencies, press services of government bodies, organizations or citizens' association. The fact of publication was confirmed, for example, by the Deputy Director of the Ukrainian service of Radio «Svoboda».

In view of this, the Supreme Court took the decision to overturn the previous rulings and send it back for examination in a court of first instance.

In 2006 there was also use made as a form of punishment against the media of bans on certain programmes. This was an area, for example, that Mayor of Kyiv excelled in. In May 2006 he lodged a civil claim with the Pechersky District Court in Kyiv asking for a ban on the further showing of the programme «Roundtable» of the municipal television company «Kyiv» about charismatic churches first broadcast on 4 April. He maintained that the programme incited enmity between religious faiths. Presenter from the television company Volodymyr Zamansky said that on 15 May he had received a copy of Chernovetsky's civil claim in which the Mayor asks the court to recognize the information made public in that broadcast such as violated his rights. The claimant names as respondents Zamansky and Tkachuk who at the time the programme was broadcast was director of the TV Company «Kyiv». He stated that during the disputed programme psychologists and experts had discussed the activities of destructive churches, as well as a film which mentioned the Pastor of the religious organization «Assembly of God» Sunday Adeladja.

Chernovetsky also asked the court to ban any programmes from «Kyiv» which contain elements of incitement to ethnic, racial or religious enmity and hatred, and to bind the television common to give him broadcasting time to respond to the information circulated.

Another form of disproportionate penalty is the use of criminal punishment which is not common, but does occur in Ukraine.

The oldest such example of this is the Salov Case. The European Court of Human Rights issued its final Judgment in the Case of Salov v. Ukraine on 6 September 2005[31]. (Application № 65518/01),

[30] The Director of Eural Trans Gas Andras Knopp (*translator*)

[31] The Judgment is available in Ukrainian on the Ministry of Justice site : www.minjust.gov.ua, and in English at: www.echr.coe.int

in which, amongst other things, it found Ukraine guilty of having violated Article 10 of the European Convention on Human Rights. This case involved a rather interesting incident which occurred in 1999 during the presidential election campaign. An unidentified individual had put out a fake special issue of the newspaper «Holos Ukrainy» [«Voice of Ukraine»] from 29 November 1999 which, in an address allegedly from the Speaker of the Verkhovna Rada, O. Tkachenko, informed of the death of one of the candidates for the Presidency and the then President of Ukraine, Leonid Kuchma. Mr Salov received this newspaper in his post box and decided to show it to friends. As a result, he was detained by law enforcement officers. On 6 July 2000 the District Court convicted Salov of interfering with the civil right to vote for the purpose of influencing the presidential election results (Article 127 of the «former» Criminal Code of Ukraine). The District Court sentenced the applicant to five years' imprisonment, which was suspended for a two-year probationary period as the actions of Mr Salov «in fact entailed no grave consequences». It also ordered the applicant to pay a fine of 170 UH[32]. As a result of this sentence his licence to work as a lawyer was later annulled.

The European Court, taking into consideration that the information disseminated had in fact been false, found that there had been a violation of Article 10.

A joint session of Ukraine's Supreme Court Criminal Chamber and Military Court Panel, after examining the criminal cases following an application from Salov to have his case and all court rulings reviewed as exceptional proceedings,, on 26 January 2007 quashed all charges against Serhiy Salov. This revoked the district court verdict from 6 July 2000, the resolution of the regional court from 15 September 2000 and the ruling of the district court from 21 September 2001, with all criminal proceedings being terminated due to the lack of any elements of the crime set out in Article 127 of the Ukrainian Criminal Code.[33]

3. CONCENTRATION OF MEDIA OWNERSHIP AND ENSURING PLURALISM OF THE MASS MEDIA

High concentration of nationwide, regional or local media outlets in the same hands poses the danger of standardized information and of no truly comprehensive coverage of publicly signification issues, presented from different points of view. The situation is worse at regional and local level where the monopolization of the media is greater and is effectively uncontrolled.

Ukrainian legislation does not take the need to ensure pluralism of the mass media into consideration, relying exclusively on general anti-monopoly legislation which does not in turn cater for specific features of the television and radio information market.

Legislation on information agencies, the press, television and radio broadcasting does not envisage openness with regard to issues of ownership. Not even special regulatory agencies in this area, such as the National Television and Broadcasting Council and the Ministry of Justice hold objective information.

It should be noted that the National Television and Broadcasting Council is failing to fulfil its duty to exercise control over pluralism of the mass media and regulation concentration of ownership. Moreover, in its report for 2006 information which is no longer current and is effectively untruthful is provided about the founders of some Ukrainian television channels where these include foreign legal entities (for example, Inter, ICTV, TET, K1 and others).

Current legislation does not contain a clear definition of owners of media outlets, that is, those who exert a real direct or indirect control (through controlling other legal entities or individuals) on a given media outlet.

There are, admittedly, certain branch-based restrictions on control of media ownership. The best example is the Law «On Printed Mass Communication Media (the Press)», where Article 10 reads:

[32] EUR 32.82

[33] The full text (in Ukrainian) is available at: http://khpg.org/index.php?id=1178807944. The following (in Ukrainian) are also on the case .: http://khpg.org/index.php?id=1089483480, http://khpg.org/index.php?id=1116947397, http://khpg.org/index.php?id=1088460459, http://khpg.org/index.php?id=1040150598, http://khpg.org/index.php?id=1009128489.

«*An individual or legal entity cannot be the founder (co-founder), or control more than 5 percent of such publications. By control in this law is meant the possibility of such an individual or entity influencing the activities of the media outlet through material or financial means*».

There are, however, no such provisions with respect to information agencies, television or radio.

Ukrainian legislation does nothing at all to regulate so-called cross-ownership, with there being no restrictions, for example, on a person or entity simultaneously owning national television channels and newspapers.

We are unaware of any cases in practice where any of the anti-monopoly legislation have been applied to the mass media by the Antimonopoly Committee.

At the present time one can find out information about an individual or company who owns a television or radio company, but if they are offshore, then it is not possible to find out who the founder was. It is worth noting that the inclination to create offshore companies is not so much prompted by the desire to hide the fact of who owns the media outlet, but by the wish to minimize taxes. One can therefore conclude that the responsibility for such concealment of real owners lies with the government which is encouraging the creation of such setups.

On the other hand, many owners do not wish to make their media assets publicly known out of fear of pressure on them over the publication of this or that information in their media outlets.

On 24 January 2006 UHHRU for the first time in Ukraine endeavoured to reveal information about the first level owners of the 10 largest national media outlets.[34] Such information had previously only been published very selectively. The information had now been checked and had been the subject of a serious public study. Later the Medial Law Institute published all founders of the television channel Inter whose owners were all concealed behind offshore companies.[35]

On 3 May 2007 UHHRU published information about a considerably broader number of media outlets, including the printed press.

The new law on television and radio broadcasting which came into effect from last year has worsened the situation. Through lack of clarity of some of the provisions of this law regarding whether foreign nationals or legal entities can be founders of television and radio organizations, foreign legal entities have been removed from the level of direct founders and transferred to the second generation of media owners. This in fact only complicates the situation and reduces the level of transparency as regards ownership of the media.

Ownership of the printed press is considerably more transparent, this being attributable first of all to much better legislation, and secondly printed media outlets do not require so much capital and it is therefore easier to finance them without involving offshore companies.

It should be noted that Ukrainian media which are externally reasonably free do not indeed overtly suggest a threat to pluralism. However the further away we move from the revolutionary events of 2004, the more clearly one can observe the ideological bent of this or that television channel or radio station, with a consequently disproportionate coverage of differing positions. There are more and more frequently cases where information is manipulated, where certain events or opinions are ignored by national media outlets. The number of such cases rose during the parliamentary election campaign.

4. RESTRICTIONS ON FREEDOM OF SPEECH IN THE ELECTORAL PROCESS

The new version of the Law «On the Election of National Deputies of Ukraine» from 7 July 2005 substantially restricted freedom of speech and threatened to generally paralyze the activities of the mass media during the 2006 pre-election campaign.

[34] Information about the UHHRU study can be found in the article: «Three generations of owners of the Ukrainian media» at: http://khpg.org/en/index.php?id=1154132546&w=media and in the article by Viacheslav Yakubenko: «Who's living in my telly?», in English, at: http://khpg.org/index.php?id=1139325984.

[35] The full control setup is given in the article (in Ukrainian): «Who controls Inter?» // http://www.helsinki.org.ua/index.php?id=1141040859.

Article 67 § 12 of this Law states that «coverage of the election process in media outlets regardless of their form of ownership taking the form of information reports, news, etc, shall be carried out without commentary and evaluation, exclusively on an objective, impartial and well-balanced basis»

Particular provisions of this Law which pertain to the regulation of the activity of the mass media during the election process actually limited the constitutional right to information and freedom of expression.

Following the adoption of this law it became even less clear exactly which public authorities had the right to temporarily suspend or withdraw the licence of a television or radio broadcasting company. According to Article 71 § 10: «...where there has been an infringement by a media outlet of the requirements set out in paragraphs five or nine of this Article, on the petition of the Central Election Commission or of the relevant district electoral commission, the particular media outlet shall have its licence or the issue of printed material temporarily suspended (pending the end of the election process) according to the procedure stipulated in law. In the event of any other infringements being committed by a media outlet, the requirement of this Law for the temporary suspension of the force of the licence or of the issue of printed matter shall be implemented exclusively with the sanction of the court».

Amendments to the Law «On the election of National Deputies of Ukraine» which brought it into compliance with the Constitution of Ukraine were only introduced in November 2005 as the result of a major campaign by the public and the media.

In accordance with Item 2 of the Law «On amendments to some legislative acts of Ukraine aimed at enabling citizens to exercise their electoral rights, ensuring freedom of political debate, an unbiased attitude from the mass media to candidates for the office of Deputy, to parties (blocs) taking part in the election process» from 17 November 2005, Article 71 § 10 of the Law «On the election of National Deputies of Ukraine» was given in the following version: «*the decision about the temporary (pending the end of the election process) suspension of a licence, or about the temporary ban (pending the end of the election process) on the publication of printed material shall be taken by the courts*». The aim of this norm is to safeguard the mass media against illegal loss of their licence, and to thus ensure freedom of expression in the Ukrainian mass media. The norm which prohibited journalists from giving commentaries and making assessments in the course of providing information reports was also removed.

However even these amendments could not fundamentally improve the situation. Electoral legislation effectively restricted political discussion through the broad interpretation of the concept «political advertising» and the serious sanctions envisaged for violations of the conditions on broadcasting such advertising. As a consequence the election campaign became sterile, bland and quite simply boring.[36]

Legislation was accordingly treated in such a way that any public speeches either criticizing or making positive remarks about specific candidates were viewed as being political advertising, and not as free debate on socially important issues. As a result, any text or video clip which showed the party or members of candidate lists was subject to strict censorship in case it could be considered to be pre-election campaigning Indeed, when media outlets circulated information with critical content about parties or members of their candidate lists, they risked ending up with law suits demanding their closure until the end of the elections. For this reason articles in newspapers and television programs teemed with reserve clauses: «This is not campaigning! This is not campaigning!»

As a result of this law, on 17 February 2006 the Sumy Regional Court of Appeal suspended issue of

the Sumy newspaper «Hromadyany Ukrainy» [«Citizens of Ukraine»] until after the elections. .The Kyivsky District Court in Simferopol suspended the licence of the Chornomorska television and radio company until the end of the elections in response to a law suit filed by the Crimean branch of the Party of the Regions. This ruling was later reversed by the Court of Appeal.

[36] Yevhen Zakharov: «Infringements of freedom of expression during the 2006 election campaign». // Available on the KHPG website in English: http://khpg.org/en/index.php?id=1141949144

However, most rulings by electoral commissions or courts involved limitations of particular individuals' freedom of expression.

Two Resolutions from the Central Election Commission were highly revealing in this respect. These were No 716 from 23 February and No. 793 from 2 March based on complaints from the electoral bloc «NE TAK!» [«NOT SO / NOT YES!»] regarding the actions of the newspaper «Silski visti» [«Rural news»] and Petro Poroshenko. In both cases the claimant alleged violation of its rights and legitimate interests. The Central Election Commission (CEC) reviewed the merits of the claim confining its review exclusively to electoral law.

The complaint lodged by the electoral bloc «NE TAK!» against the newspaper «Silski visti» was over an article: «Wishing you happiness in the noble cause of serving the Ukrainian people», printed in No. 18 from 14 February. The CEC states in its Resolution: «the article contains value judgments in the form of political rhetoric, critical, polemic and sarcastic comments aimed at some participants in the electoral process, specifically:

«...Ukraine remembers those who tried to crush «Silski visti» – Leonid Kravchuk (1986) ... who cynically trampled on human rights by banning subscription to «Silski visti» on territory in their control... While Leonid Kravchuk, obviously, in the role of sergeant-major of the suppression corps, or maybe to mark the 20th anniversary since the first waving of sabres above the head of the leader of the «Silski visti» staff, I. Spodarenko, began a new assault on «Silski visti», announcing a protest campaign against the Presidential Decree No. 60 from 23 January 2006 which honoured Ivan Vasylyovych Spodarenko with the title of Hero of Ukraine.

One can understand the ex-Communist Party of Ukraine ideologist: the Party henchman doesn't want the newspaper and its leader, through their very existence in this world, to be a reminder of his dark past. Yet what a banner he raises above himself: the honour of Ukraine!

...The newspaper «Silski visti» really weighs down upon Mr Kravchuk. It's clear that if he was lying in his grave, he'd turn in it».

«...It is you, Mr Kravchuk, who are the leading actor and at the same time the director of the theatre of the absurd. And the point is not that you are transforming yourself from the role of militant blasphemer to that of God's Anointed, nor that you are so concerned about the memory of the victims of the Holocaust, but banned the very mention of Holodomor [the Famine of 1932-1933] in Ukraine. At the end of the day you don't care what you use to trade with, you once went with your image as the first president of Ukraine trying the Cossack card to a candidate for the office of Kyiv Mayor who suited you but wasn't wanted at all by the people of Kyiv. However that is from the area of morals. Although, what morals?. You when you were President of Ukraine squandered the world's largest (at the time) Black Sea Fleet. As President of Ukraine you diddled away up to one and a half billion of people's savings, casting your own people into abject poverty, unemployment, and also crushing inflation. And you, through Kuchma's bounty, are «Hero of Ukraine!»

That really is a theatre of the absurd. And you are now trying the card of anti-Semitism and xenophobia, as if forgetting that it's been beaten and is lying in the rubbish heap, of any use only to down-and-outs who live from such rubbish containers and sometimes even sell things they find. You, Mr Kravchuk, who are always flaunting your knowledge of the law, you who are supposedly a legal know-it-all. Do you really not know that the accusation against «Silski visti», initiated by Rabynovych and fabricated by Saprykina, of anti-Semitism, xenophobia and stirring up inter-ethnic antagonism was revoked by the Kyiv Court of Appeal?

Your political companions, Viktor Medvedchuk[37] and Viktor Yanukovych, the main pillars of the Kuchma regime, have also got involved in the case. Here, then, it's all clear.

However at the bottom of the letter which began the campaign against «Silski visti», and at the same time – on the pre-election wave – against the President of Ukraine Viktor Yushchenko, there are 13 other signatures...»

The CEC decided that the article contained features of pre-election campaigning and that it had been printed without prior agreement with a participant in the electoral process, and allowed this part of the claim made by the bloc «NE TAK!» As regards the opinion of the claim-

[37] Viktor Medvedchuk was Head of the Presidential Administration in Kuchma's regime and wielded considerable power. (*translator*)

ant that the article «published some knowingly untruthful and libellous information about the participant in the electoral process – the candidate for the post of National Deputy Leonid Kravchuk», the CEC did not agree with this assertion, stating that «the claimant has not submitted to the Central Election Commission any proof of the contention that the information which he considers to be knowingly untrue and libellous is such. Therefore this part of the claim is not accepted».

The CEC ordered the newspaper «Silski visti» to «refrain in future from committing infringements of the Law on the Elections». Such a decision acted like a great «cold shower» and obstructed the will to freely discuss the qualities of participants in the election process.

In Resolution № 793 from 2 March the CEC considered the claim brought by the bloc «Ne tak!» against the actions of Petro Poroshenko. The claim states:

On 21 February 2006 at 19.40 during a meeting with the public of Kherson which was broadcast on the television channel «SKIFIYA» the respondent of the claim, P.O. Poroshenko stated the following: «There is no alternative – and this is a true political reform. Not the empty waffle initiated by the communists, Medvedchuk, the [Party of the] Regions and Kuchma».

During this meeting, P.O. Poroshenko expressed the following opinions with regard to N.I. Shufrych[38]: «I'm sorry, but I think he's a clown. I'm pleased that this is already seen by the entire country's population, and I consider that the political faction that he is leader of is ... the one thing that I am ashamed of, that the first President of our country, Mr Kravchuk is at the head of a list which is demanding the abolition of Ukrainian as the state language pr the introduction of Russian, which ... well he should be ashamed of himself. And all the others there are clowns. Their time has already passed. Think of who Medvedchuk was a year ago, or a year and a half ago. He was the lord of the state. Look how he was blown off the scene as soon as real representatives of the people came. Look at what the level of support today is for that political force «NE TAK!» – without any rigging, without bans on speaking out on television – he's nobody...»

As proof of these circumstances, the claim was armed with a videocassette and compact disk with recordings of P.O. Poroshenko's addresses. However the CEC decided that the video recording did not contain the opinions given above and that it was not possible to establish that the video material recorded on the compact disk had been broadcast on the television channel «SKIFIYA». The candidate for National Deputy, Petro Poroshenko did not belong to the exclusive list of individuals who, according to paragraph one of Article 71, are prohibited from taking part in pre-election campaigning. His participation, therefore, in pre-election campaigning was not in contravention of the regulations of the Law on the elections. On this basis, the CEC decided to reject the claim of the bloc «NE TAK!»

It looks as though the television channel «SKIFIYA» in its coverage of Poroshenko's meeting with the public of Kherson simply cut out his critical remarks about his opponents, and in this way saved themselves from the sanctions, or even forced closure, they could have faced.

We thus find that the Law on the elections, and its practical application as this is developing present the following picture: candidates for the office of Deputy have the opportunity to freely discuss election issues, while journalists and the mass media may only provide coverage of these debates on the basis of agreements with the political parties (blocs), that is, representing their interests. They themselves are not able to freely express their opinions, since any critical comments are treated as pre-election campaigning. They are therefore forced either to abandon any coverage of the election campaign or resort to serious self-censorship.

One should also mention the entirely unjustified rulings banning the Minister of Internal Affairs, Yury Lutsenko, from making public information about the criminal past of candidates for the office of National Deputy with reference to norms which prohibit campaigning by government officials.

These examples clearly show that the provisions on pre-election campaigning in the Law «On the Election of National Deputies» contravene the Constitution of Ukraine and Article 10 of the Euro-

[38] Nestor Shufrych is a member of the Social Democrat Party of Ukraine (United), which is one of the parties in the opposition bloc «NE TAK!». He was no. 4 on the candidate list below ex-President Kravchuk and ex-Head of Kuchma's Administration, Viktor Medvedchuk (*translator's note*).

pean Convention for the Protection of Human Rights and Fundamental Freedoms. This had a particularly negative impact on the course of the parliamentary elections as a result of considerable limitation on freedom of expression.

These legislative norms must definitely, therefore, be changed before the next electoral campaign.

5. RESTRICTIONS OF FREEDOM IN THE CONTEXT OF PROTECTING PUBLIC MORALS

In the last few years in Ukraine limitation on freedom of expression has been heightened through the protection of public morals.

First of all a law was adopted «On the protection of public morals». As discussed in «Human Rights in Ukraine – 2004» and «Human Rights in Ukraine – 2005», .this basically runs counter to the Constitution of Ukraine, as well as to international standards in the area of freedom of speech.

However at the present time incidents where this legislation is being applied have begun to appear.

In March the National Expert Commission on Issues involving the Protection of Public Morals prohibited a third film, this time one of Quentin Tarantinos. Previously viewers had been prevented from working the remake of the famous horror film «Texas Chainsaw Massacre», and then George A. Romero's «Land of the Dead

The advertising clip for the mobile operator «Jeans» in which a young girl and guy lock themselves in a toilet and then come out, straightening out their trousers, was deemed immoral. The National Expert Commission took this decision on the basis of an application from the Kyiv prosecutor's office to check whether the advertisement being shown on channels 1+1, «Inter», «Novy Kanal» and ICTV complied with the law on the protection of public morals. The conclusion of the Commission's experts was that the clip was of a sexual-erotic nature. Its showing, it decided, was therefore possible only with legally established restrictions – on free access broadcasting channels only from 24.00 to 4 in the morning, or on coded channels.[39] This decision was not based on clear and logical legal criteria and is an obvious violation of freedom of speech. Several other advertising clips have met the same fate.

It should be pointed out that the conclusions of the National Commission are not binding for the courts. At least during hearings into criminal proceedings the courts return for further investigation cases linked with this issue which are based on National Commission conclusions. These conclusions are, for example, not recognized as proof due to the lack of the qualification «art specialist». These experts are furthermore not included in the Ministry of Justice's State register as required by criminal procedure legislation.

A ban was also imposed on producing a nationwide newspaper for gays and lesbians «Gay.Ua», although this is in fact has been appealed.

It should be noted that limitations on freedom of speech for the purpose of protecting public morals are acceptable. However in Ukraine, despite a current law on the protection of public morals, clear grounds are lacking for limiting freedom of speech for this purpose. As a result of this, such a restriction is carried out in a selective manner and at the personal discretion of certain officials of government bodies. Nobody is able to foresee their behaviour in such a way as to not infringe legislation on the protection of public morals.

6. RECOMMENDATIONS

1) Implement a programme for reforming State-owned media outlets by changing their system of management and financing in accordance with the recommendations of the Council of Europe

[39] «Jeans» have been asked to hide their advertisement «rabbits» in a twilight zone» // Ukrainska Pravda, 22.12.2006: www.pravda.com.ua

and OSCE. The best example of such reform is the introduction of public TV and radio broadcasting on the basis of UT-1 National Television Channel and the First National Radio Channel. The process of privatization must be accelerated.

2) Abolish the procedure for permission-based registration of printed media outlets which is not in line with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[40]

3) Extend those with the right to engage in publishing activities from enterprises to all forms of legal entities.

4) Draw up and introduce the appropriate legislation and programmes of self-regulation for journalists and media outlets in order to reduce the spread of material which is paid for or produced on commission with infringements of journalist standards of objectivity and balanced presentation of information.

5) Abolish the laws «On the procedure for media coverage of the activities of public authorities and bodies of local self-government in Ukraine» and «On government support for the media and social protection for journalists», allowing for the cancellation of particular benefits for journalists of State media outlets, and to ensure that they have the same rights as journalists on private media outlets.

6) It would be advisable to review legislation on the elections in order to ensure free discussion in the media about candidates, their weak and strong points and various aspects of their political programme and activities.

7) Review the possibility of adopting and developing a law on journalists' rights, using preparatory work carried out by the State Committee on Television and Radio Broadcasting and draft law № 9175 from 27 February 2006 «On protection of journalists' professional activities». This issue is of practical importance since, for example, the rights of journalists working for television and radio companies are not defined at all.

8) Introduce amendments to the law on television and radio broadcasting in order to bring it into line with standards of the Council of Europe, OSCE and the European Union.

9) Introduce amendments to legislation making it possible to identify the real owner of a media outlet, especially of television channels and radio stations; to introduce effective control over the concentration of media outlets in the hands of one owner or members of his or her family; to introduce anti-monopoly restrictions for the information market in compliance with recommendations of the Council of Europe, OSCE and the European Union; to introduce necessary procedure for punishing those who infringe legislation on the concentration of the media.

10) Ensure quick and transparent investigation into all reports of violence and deaths of journalists, as well as into cases of interference in journalists' activities.

11) Accelerate the procedure for ratifying the European Convention on trans-border television, the Additional protocol to the Convention on trans-border television, and also introduce amendments to legislation on the implementation of its regulations, as well as the provisions of the EU Directive 85/552/EU, 97/36/EU «Television without Borders.»

12) Disband the State Committee on Television and Radio Broadcasting during an overall consideration of Draft amendments to the Constitution of Ukraine. Control also needs to be heightened over the use of funds by this government agency due to numerous cases of abuse. The system, for example, of ordering State-funded television and radio programmes, book publications, films and other services needs to be made more transparent.[41]

13) Pass a new version of the Law «On protection of public morality» which sets out clearer grounds for restricting freedom of expression of views in order to protect public morals, as well as removing preliminary control over the distribution of films, etc.

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[40] More detail on this can be found in the Special Report by the OSCE Representative on Freedom of the Media Miklos Harazhti «Media registration in the OSCE region: observations and recommendations from 29 March 2006 http://www.osce.org/fom/

[41] Див.: Держкомтелерадіо потребує кардинальних змін // http://www.helsinki.org.ua/index.php?id= 1173972825.

IX. FREEDOM OF ASSEMBLY[1]

1. LEGAL REGULATION OF FREEDOM OF PEACEFUL ASSEMBLY

1.1. THE UKRAINIAN CONSTITUTION

Freedom of peaceful assembly is guaranteed by Article 39 of the Constitution:

«Citizens have the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government.

Restrictions on the exercise of this right may be established by a court in accordance with the law and only in the interests of national security and public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, or protecting the rights and freedoms of other persons».

In a Judgment from 19 April 2001 the Constitutional Court noted that the right to peaceful assembly is an «*inalienable and inviolable*» right, and gave an official interpretation of Article 39 of the Constitution, in particular with regard to notification in advance of events planned. The Constitutional Court also stated that there should be a separate law to provide specification for particular provisions of Article 39, but such a law has yet to be adopted.

1.2. PARTICULAR ASPECTS OF COURT CASES INVOLVING RESTRICTIONS ON FREEDOM OF ASSEMBLY

Article 182 of the Code of Administrative Justice of Ukraine (CAJU)[2] outlines «special aspects of court proceedings on administrative applications from those with the authority to restrict the right to peaceful assembly», while Article 183 of the CAJU details the «special aspects of court proceedings on administrative applications to have limitations of the right to peaceful assembly revoked». These articles establish special time periods for reviewing such cases.

Article 182 stipulates that the public authorities and bodies of local self-government, on receiving notification of a planned gathering have the right to apply to their local administrative court for permission to have the gathering banned or various kinds of restrictions on the freedom of assembly imposed. In accordance with the CAJU the administrative court must review the case within three days of the application being lodged, and in the event that the proceedings have been started less than three days before the intended holding of the gathering, then immediately. A court application which arrives on the day that the meeting is planned to take place, or after it has occurred, is not reviewed. Court rulings in such cases must be enforced without delay. As a result court bans are, as a rule, issued several hours before the beginning of

[1] Prepared by Volodymyr Chemerys, member of the Board of the Institute «Respublica» and of the Board of the Ukrainian Helsinki Human Rights Union. It not otherwise stated, material used in this chapter is that of the Institute «Respublica» or of UHHRU Розділ підготовлено.

[2] The Code came into force on 1 September 2005

the peaceful gathering which prevents the organizers from appealing against the ruling and thus defending their rights.

Article 183 establishes that the organizers of the meeting have the right to lodge an appeal with the administrative court for the place where the gathering is planned «with a court application to remove the restriction on exercising the right to peaceful assembly imposed by public authorities or bodies of local self-government after being notified of the planned gathering». The procedural requirements as regards time limits for reviewing the appeal are the same as in Article 182.

It should be noted that while in 2006 the authorities and bodies of local self-government applied on several occasions to the courts to have meetings banned, as per Article 182 of the CAJU, there were no applications from the organizers of gatherings under Article 183 to have restrictions removed. This is explained firstly, as monitoring of freedom of assembly in Ukraine from 2004-2006 carried out by the civic organization Institute «Respublica» found, by the fact that the restrictions and obstructions to peaceful assembly were not in most cases created by the authorities or bodies of local self-government notified by the organizers, but by law enforcement agencies or local courts. Secondly, the obstructions only emerged during the meetings, and not earlier. Furthermore, CAJU does not set particular time limits for appeals against rulings of district administrative courts banning or restricting freedom of assembly.

Ukrainian court practice shows that although in the majority of cases courts of appeal overturn bans imposed by first instance courts, the review process of such appeals can go on for months. This means that even if the administrative court of appeal accepts that the district administrative court made a mistake and rules that the meeting may be held at the time and in the place planned by its organizers, in fact the right of the organizers and participants in the gathering to hold their meeting in the designated time and place cannot now be restored.

The demand that special time frames for judicial review of an appeal be established so that the organizers or participants in an assembly may still restore their rights is stipulated by the OSCE/ODIHR Guidelines for drafting laws pertaining to the freedom of assembly (October 2004). However until now, for the reasons mentioned above (the long periods required for judicial examination of appeals), the majority of organizers of meetings in Ukraine, in the event of a ban being imposed on holding the gathering, do not lodge an appeal with the relevant courts of appeal.

1.3. LEGISLATION ON PEACEFUL ASSEMBLY DATING FROM THE FORMER USSR

In Ukraine there is no legislation which regulates enjoyment of the right to peaceful gatherings, aside from those provisions and restrictions of a general nature mentioned above. However the public authorities, bodies of local self-government and the courts are to this day using normative acts of the former USSR, such as, for example the Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 «On the procedure for the organization of meetings, political rallies, street events and demonstrations in the USSR» which we consider to be unlawful.

The Decree runs counter to the Constitution of Ukraine, in particular, Article 39 which stipulates procedure for notifying the authorities on mass gatherings organized, and not procedure for seeking permission to hold them, and which does not contain limitations with regard to when notification must be given. The Decree also contravenes other provisions of the Constitution.

Yet, for example, the «Temporary Regulations on review procedure by the city executive committee of issues involving the holding of gatherings, political rallies, marches and demonstrations in Kharkiv», adopted by the Kharkiv City Council on 7 March 2004 (No. 221) and still in effect now, directly refer to the above-mentioned Decree. The Kharkiv document states: *«The Temporary Regulations on review procedure by the city executive committee of issues involving the holding of gatherings, political rallies, marches and demonstrations were drawn up in accordance with ... the Decree Presidium of the Supreme Soviet of the USSR «On the procedure for the organization of meetings, political rallies, street events and demonstrations in the USSR» (in effect on the territory of Ukraine in accordance with the Resolution of the Verkhovna Rada of Ukraine from 12.09.91 «On the temporary legal force of certain legislative norms of the USSR on the territory of Ukraine»).*

The Kharkiv City Council has thus effectively taken upon itself the powers of the Constitutional Court of Ukraine in deciding that Decree mentioned complies with the current Constitution of Ukraine.

1.4. LIABILITY FOR VIOLATION OF THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY

Law enforcement agencies apply general legal norms on ensuring public order, yet almost all individuals detained when a mass gathering is dispersed are charged under Articles 185 and 185-1 of the Code of Administrative Offences of Ukraine (CAO).

Article 185 of the CAO – «persistent failure to comply with a lawful instruction or demand from a police officer» allows for a fine from 8 to 25 times the minimum monthly wage before tax (approximately 30 to 85 US dollars), community service for a period from one to two months, with twenty percent deduction from wages or administrative arrest for up to 15 days.

Article 185-1 of the CAO – «breach of the procedure for organizing and holding meetings, political rallies, marches and demonstrations» imposes various penalties for the participants and organizers of these gatherings. Participants receive a warning or fine of between 10 to 25 times the minimum monthly wage before tax, while the organizers can be liable to a fine from 20 to 100 times the minimum monthly wage before tax (from around 70 to 350 US dollars), community service for a period from one to two months, with twenty percent deduction from wages or administrative arrest for up to 15 days. The same penalties as for organizers are to be imposed on participants if they have previously done the same thing. This difference arose as a result of the fact that the Verkhovna Rada of Ukraine on 2 June 2005 introduced amendments to the CAO which remove administrative arrest as punishment for participants in gatherings if they have breached «the procedure for organizing and holding meetings» for the first time.

However in the majority of cases it is specifically Article 185 of the CAO which is applied to both participants in and organizers of meetings because it is considerably easier for police officers to convince a Ukrainian court that there was «persistent failure to comply», than that there was a «breach of the procedure for organizing and holding meetings», since for the former, in practice, Ukrainian courts find the evidence of the police officers themselves sufficient.

Additionally, in 2005 law enforcement officers applied legal norms of Article 279 of the Criminal Code of Ukraine on liability for blocking transport routes. This article imposes fines of up to 50 times the minimum monthly wage before tax (around 170 US dollars), community work for up to two years; custodial arrest for a period of up to six months or limitation of liberty for up to three years. However throughout 2005, according to information from the State Court Administration, nobody was convicted of this offence, nor were any cases recorded for 2006.

Article 296 of the Criminal Code («group hooliganism») is also applied to participants of gatherings responsible for organized confrontation with law enforcement officers, members of counter-demonstrations or other members of the public. This article allows for periods of up to 10 days imprisonment.

In Ukrainian legislation there is a penalty for «unlawful obstruction of the organizing or holding of gatherings, political rallies, marches and demonstrations (Article 340 of the Criminal Code) for officials or for any individuals if their actions were carried out with the use of physical violence, of community work for a period of up to two years, custodial arrest for a period of up to six months or limitation of liberty for the same period.

In 2006, according to information from the Ministry of Internal Affairs (MIA), 158 participants in gatherings faced administrative charges under Articles 185 and 185-1 of the CAO. Twenty criminal investigations were launched under Article 296 of the Criminal Code («group hooliganism»), but not one under Article 340. There are no recorded cases in 2006 of officials being punished for obstructing the right of peaceful assembly.

In 2006 the organizers of a «Freedom March» (which takes place in almost 300 cities in the world on the first Saturday in May each year) informed the prosecutor's office of the central district in Kyiv that the heads of the Kyiv police force had obstructed their demonstration (there are more details about this further in the section). Having infringed the time period for examining the application, as well as procedural norms (witnesses, the organizers of the March and police officers were

not questioned), the prosecutor's office refused to launch a criminal investigation under Article 340 of the Criminal Code. ККУ. Then, following an appeal from the organizers of the March, on 29 November 2006 the Shevchenkivsky District Court in Kyiv revoked the Prosecutor's resolution and ordered another review of the original application. At the present point in time, the prosecutor's office is still examining the March organizers' application.

1.5. LEGISLATIVE ACTS OF BODIES OF LOCAL SELF-GOVERNMENT CONCERNING THE RIGHT TO FREE ASSEMBLY

The Constitution stipulates that the right to free assembly may be limited only in accordance with the law. Despite this, local authorities often pass their own legal acts which have no relation to the law and which thereby flagrantly violate the freedom of peaceful assembly.

Such rulings were passed during the 1990s and 2000s by city councils of the majority of regional centres in Ukraine, in particular, in Kyiv, Kharkiv, Donetsk, Dnipropetrovsk, Sumy, Lviv, Kirovohrad, Poltava and in some district centres (for example, Izyum in the Kharkiv region, Okhtyrka in the Sumy region, and others).

One should add here that, in accordance with Article 92 of the Constitution, the human rights and civil liberties, the guarantees of these rights and liberties; the main duties of the citizen are determined exclusively by the laws of Ukraine, and not by rulings passed by local executive bodies.

The Law «On local self-government in Ukraine» empowers executive bodies of village, settlement and city councils to only «resolve in accordance with the law issues pertaining to the holding of meetings, political rallies, demonstrations, sport, shows and other mass events and ensure that public order is maintained during them» (Article 38 of the Law). However as an analysis carried out by the Institute «Respublica» showed, all rulings passed by Ukrainian bodies of local self-government on freedom of assembly are in contravention of the Constitution of Ukraine – a law of direct effect – and limit civil liberties.

Most of these rulings of local councils are based on the Decree already mentioned of the Presidium of the Supreme Soviet of the USSR and establish a ten day period for notification of a planned event. Moreover, such rulings establish significant unconstitutional limitations on the right to freedom of assembly.

The «Temporary Regulations on review procedure by the city executive committee of issues involving the holding of gatherings, political rallies, marches and demonstrations in Kharkiv» stipulate that «*as a result of a review of the notification (of the planned event – author) a decision may be taken to prohibit the holding of a mass event*». This regulation means that in Kharkiv permission-based rules and procedure have effectively been introduced for holding gatherings. According to the «Regulations on organizing and holding mass events in Dnipropetrovsk», approved by the Dnipropetrovsk City Executive Committee in 2003, rallies are permitted in the city only in one place designated by the city authorities, and processions only according to one route. In order to hold a rally in the city, the organizers must, pursuant to these «Regulations» coordinate their plans with eight (!!!) municipal services.

It should be mentioned that in many cases neither the organizers of the meetings nor the local authorities adhered to the norms of such legal acts. The rallies were held without being agreed in the «necessary» manner and not in the places «designated» without any consequences. On some occasions, however, the local authorities lodged applications with the court to ban meetings specifically on the basis of such «Regulations», and the court issued such bans.

The fact that these «Regulations» are in contravention of both the Ukrainian Constitution and international human rights laws to which Ukraine is a signatory, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms, is confirmed by the fact that in all cases where members of the public have asked the court to have the «Regulations» quashed, the courts have allowed their applications.

Thus for example in 2005 the relevant acts of the Lviv and Kyiv City Councils were cancelled, while in 2006 the Sumy City Council itself revoked its «regulations» passed in 2003. In March 2007, on a civil suit lodged in Dnipropetrovsk by Andriy Shulyak, representing the «Respublica» Institute,

the Babushkinsky District Court in Dnipropetrovsk quashed the above mentioned document of the Dnipropetrovsk City Executive Committee.

Ukrainian human rights organizations have begun a campaign of civil law suits demand that such acts are revoked in all cities of the country where they are presently in force.

1.6. REGULATIONS ON ERECTING «SMALL ARCHITECTURAL FORMS» IN THE CONTEXT OF THE RIGHT TO PEACEFUL ASSEMBLY

For regulating and holding mass events, some local authorities make use of another regulation which formally has no bearing on the right to peaceful assembly, this being a regulation regarding the establishment on city territory of «small architectural forms». Such regulations have been passed by the councils of many cities, including Kyiv and Donetsk

«Small architectural forms» are kiosks, stalls, tents and other small constructions which are erected by businesses of various forms of ownership for commercial purposes. Such «forms» are, moreover, intended to function for a long time, and their erection should undoubtedly be subject to regulation by the local authorities.

However in Ukraine it has become traditional to hold acts of protest in the form of «tent cities» The erection of tent cities, i.e. tents put up not for commercial activity, but in order to hold a peaceful gathering, needs to be regulated within the framework of norms on the right to free assembly, and not regulations regarding «small architectural forms».

During 2006, particularly in Kyiv, the practice became widespread where representatives of the municipal improvements department (the department responsible for improvements to a district or the city as a whole) issued «instructions» stating that «small architectural forms», meaning tents erected by participants in a peaceful gathering, infringe the appearance of the city and must be dismantled. Such practice is a convenient way for the local authorities to stop protest actions without court sanction and therefore in violation of the Constitution. Where participants in some gatherings have refused to voluntarily dismantle the tents, the «small architectural forms» have been pulled down by the municipal authorities.

On 21 March 2006 representatives of the Kyiv municipal improvements department handed the inhabitants of a tent city of Maidan Nezalezhnosti [Independence Square] an instruction stating that they had to remove from the central square of the capital «unlawfully erected small architectural forms». The tents had been erected by people living in Transdniester, as well as Ukrainian citizens belonging to the party «Bratstvo» [«Brotherhood»], as a sign of protest against the Ukrainian Government's policy towards Transdniester (a breakaway region of the Republic of Moldova). After this, the municipal services removed the tents without a court ban on the action. The police did not intervene while the tents were being dismantled, although they detained three members of the protest action who were, however, soon released with no charges being laid.

A similar scenario was played out on 21 October 2006 by representatives of the improvements department for the Holosiyivsky District in Kyiv against tents erected by inhabitants of the village Troeshchyna around President Yushchenko's dacha near the village of Koncha-Zaspa. The picketers, around 30 elderly women, were demanding that the President become personally involved in resolving land issues in their village. Representatives of the police – the specially trained units «Berkut» and «Sokil» whose numbers were several times greater than those of the picketers not only failed to prevent the tents being pulled down, but actually detained five members of the picket. Two were released immediately, but three others received warnings.

However, from December 2006, following a change in leadership in the Ministry of Internal Affairs, the situation changed. That is, the municipal authorities continued to apply some «orders» regarding «small architectural forms» in order to stop rallies and pickets however police officers refused to cooperate with them in unlawful dispersal of peaceful assembly.

Thus, on 27 December the Kyiv municipal services, on the basis of an «order» and without court sancetion, dismantled a tent city erected by the civic organizations «Public Council of Ukraine» on Maidan Nezalezhnosti. The police refused to take any part in dismantling the tents referring to the lack of an appropriate court ruling. They also refused to write up protocols on administrative offences by inhabitants of the tent city, saying that there had not been any such offences. Nobody

was detained. The next day the «Public Council of Ukraine» re-erected their tent city in the same place and then before New Year voluntarily dismantled it.

The police also refused to work with the municipal authorities in dismantling the tent city near Koncha-Zaspa re-erected at the beginning of 2007. In response to a letter from the Kyiv Mayor Leonid Chernivetsky where the Mayor complained about the «inaction» of the Kyiv police on getting rid of tent cities in December 2006, the Minister of Internal Affairs Vasyl Tsushko replied that the police officers had acted in accordance with the law.

1.7. DRAFT LAWS ON FREEDOM OF PEACEFUL ASSEMBLY

Before 2005 no Draft Law on freedom of assembly had been passed by Ukraine's parliament. In 2005 the Institute «Respublica», in cooperation with specialists from the Ukrainian Helsinki Human Rights Union, drew up a draft law «On freedom of peaceful assembly» which on 15 July was tabled in the Verkhovna Rada (registration No, 7819)[3] by State Deputy, Viktor Musiyaka. It was not, however, considered by the fourth Verkhovna Rada, and therefore the authors of the bill found support from representatives of all five factions of the fifth Verkhovna Rada elected in 2006 – Taras Chornovil from the Party of the Regions, Andriy Shevchenko from the Bloc of Yulia Tymoshenko, Kateryna Levchenko from Nasha Ukraina [Our Ukraine], Yevhen Filindash from the Socialist Party and Oleksandr Holub from the Communist Party.

The Draft Law was prepared in compliance with the OSCE/ODIHR Guidelines for drafting laws pertaining to the freedom of assembly» as well as with case law of the European Court of Human Rights, and its key parameters are as follows. Together with the concepts «gathering», «political rally», «march», «demonstration», in accordance with European practice, the following concepts have been introduced: «spontaneous demonstration» (that is, gatherings not organized by any individual or legal entity),»counter demonstration» {gatherings which take place at the same time and in the same place with the aim of expressing different or opposing views), as well as, in keeping with the Ukrainian tradition, the concept of «tent cities».

The Draft Law guarantees the right to peaceful assembly for citizens of Ukraine, foreign nationals and stateless persons, those younger than 18, persons whose civil activities have been restricted by order of the court, as well as those who are serving a sentence in penal institutions. In compliance with the Constitution of Ukraine the Draft Law does not contain any restrictions on freedom of assembly, either in time or in space, or by dictating the duration, form of the assembly or the number of participants.

A list is provided of circumstances which may not be used as grounds for limiting freedom of assembly, in particular the following: the absence of notification of a plan to hold a peaceful gathering; the lack of an organizer (organizers) of a peaceful gathering in the event of a spontaneous demonstration; the holding of a counter demonstration; the scheduled coincidence of the peaceful gathering with measures linked with a public holiday, sporting event, concert, festival, folk festivals, etc; the discussion during a peaceful gathering of issues pertaining to the dismissal of any state officials, a change of those in power, of the constitutional order, of the administrative or political system or of territorial integrity; calls to hold a nationwide or local referendum, early elections to any public authority or body of local self-government, or to a boycott of a referendum or elections; the blocking by participants in a peaceful gathering of streets, roads, buildings or other constructions; the level of noise at the place where the peaceful gathering is held; the inability of the relevant agency of the Ministry of Internal Affairs to ensure the protection of public order during a peaceful assembly. All such circumstances were identified in the course of monitoring of the observance of the freedom of assembly in Ukraine as being those which, in contravention of the Constitution of Ukraine, are the most frequent violations of the right to peaceful assembly.

The Draft Law sets out special time periods for judicial examination of appeals against rulings handed down by first instance courts restricting freedom of assembly: *«An application to bring an appeal or an appeal submitted by a claimant against a court ruling limiting the right to peaceful assembly, shall be reviewed as first priority, within a two-day period from when it is received, however under all*

[3] The Draft Law is available (in Ukrainian) on the website of the Verkhovna Rada of Ukraine http://www.rada.gov.ua.

circumstances before the date that the peaceful gathering is planned for, and in the event that the court ruling restricting the right to freedom of assembly was taken just before the beginning of the peaceful gathering – immediately».

The Draft Law also imposes liability where officials or other individuals have violated the right to freedom of assembly

In 2006 a draft law on peaceful assembly was also presented by the Ministry of Justice. Following cooperation between civic organizations and the Ministry, the Government's draft changed considerably from its original form and became closer to the draft offered by civic organizations. At the present time it is still being worked on.

Both these draft laws received a generally positive assessment from OSCE and Venice Commission experts (Opinion No. 385/2006)[4].

Two other draft laws on freedom of assembly were also tabled in the Verkhovna Rada. One of them was from National Deputy H. Udovenko (Nasha Ukraina) and was similar to a bill submitted by the same Deputy and rejected back in 2004. The draft is like the law currently in force in the Russian Federation which significantly restricts freedom of assembly and has been used as the grounds on numerous occasions for breaking up rallies of the Russian opposition. The other bill, from O. Feldman (Bloc of Yulia Tymoshenko) also received criticism from Ukrainian civic organizations for imposing considerable restrictions on freedom of assembly (excessively long periods required for notifying of meetings, limitations on freedom of assembly in terms of time and space, excessively broad powers for the police in stopping gatherings, etc).

However, given the political crisis which broke out in Ukraine in early 2007, it is unlikely that any of these draft laws will be considered in the near future.

2. INFRINGEMENTS OF FREEDOM OF PEACEFUL ASSEMBLY DURING 2006

2.1. GENERAL OVERVIEW

2006 again saw violations on a large scale of the right to freedom of peaceful assembly by the local authorities, bodies of local self-government, law enforcement agencies and first instance courts.

A number of pickets, political rallies and demonstrations (in the majority of cases those of the opposition) were groundlessly prohibited by the courts. Some political rallies and tent cities were broken up without any court warrant. In dispersing political rallies and marches the police used force, as a result of which demonstrators received injuries.

In some cases, participants in peaceful meetings were attacked by unidentified individuals not connected with the police (employees of municipal services, private security outfits or political opponents). In the majority of such cases law enforcement officers took no action.

A number of organizers and participants in peaceful events faced administrative penalties.

2006 saw 170.7 thousand events in which 85.3 million people took part. By comparison, in 2005 there were 124.4 thousand such events involving 63 million people (based on figures from the Ministry of Internal Affairs Department of Public Safety). According to the same data, over the last ten years the number of mass events has become 16 times higher. The police state that 109 events (involving 54 thousand people) took place «with infringements of the procedure for mass events», with these leading to 28 criminal investigations (under Article 296 of the Criminal Code «group hooliganism»). Administrative charges were laid against 158 members of gatherings (under Articles 185 and 185-1 of the CAO).

Given that during 2005 administrative charges were only laid against 40 organizers and active participants in events, one can conclude that in 2006 more Ukrainians exercised their right to peaceful assembly (35% more than the previous year), however more people also came into conflict with the authorities in exercising their right.

[4] The Council of Europe Venice Commission's Opinion is available in English on the UHHRU website:: http://www.helsinki.org.ua/en/index.php?id=1162206184.

The largest mass events were different types of holiday celebrations organized by the authorities, and no infringements were recorded. Most such infringements were in connection with meetings organized by groups opposing the present administration (the Progressive Socialist Party, «Bratstvo» [«Brotherhood»), «Proryv» [«Breakthrough»] and others). At the same time, the number of infringements against meetings of a social, rather than political, nature increased against 2005.

Unlike 2005, the geographical scope of violations of freedom of assembly narrowed in 2006. In a lot of regions no infringements were recorded at all, however an increase in the numbers of infringements was observed in Kyiv (where the majority of mass events were held), Kharkiv (where there had been none in 2005), Sevastopol and the Autonomous Republic of the Crimea.

2.2. INFRINGEMENTS OF THE RIGHTS OF PEOPLE TAKING PART IN PEACEFUL GATHERINGS WITH POLITICAL DEMANDS

In 2006, as previously, the largest numbers were drawn by mass events connected with various holidays or significant dates organized by the authorities, sporting or musical events and so forth. All these gatherings passed without any encroachments on freedom of assembly except for the celebration on Independence Day on 24 August. On that occasions the Kyiv police blocked members of the Bloc of Yulia Tymoshenko (BYuT) near the metro station «Zoloti vorota» and of the Public Council of Ukraine on Maidan Nezalezhnosti [Independence Square] while they were trying to get to St Sophia Square where ceremonies were taking place with the participation of the countries leaders and show President Yushchenko banners condemning his appointment of the leader of the Party of the Regions Viktor Yanukovych Prime Minister.

Another category of mass events was that of political gatherings – those either held by political organizations or under political banners. The largest of these was the rally of the Crimean Tatar Mejilis to mark the anniversary of the deportation of the Crimean Tatars from the Crimea (in Simferopol on 18 May); protests against the entry into the Feodosiya port of a NATO warship (the Crimea, June); protests against the appointment of Viktor Yanukovych Prime Minister and counter-demonstrations by Yanukovych supporters (Kyiv, July – August); a demonstration by those calling for the Ukrainian Resistance Army [UPA] being recognized as having fought for Ukraine in the Second World War and a counter-demonstration of their opponents (Kyiv, 15 October).

In some cases these meetings were prohibited by the court on the application of the local authorities. This was the case, for example, with the demonstration by Crimean Tatars and counter-demonstration by ethnic Russians in Partenit (Crimea, 11 May); the demonstration by the supporters of the UPA and counter-demonstration of their opponents (Kyiv,, the court ban was on 14 October); the demonstrations of left-wing and right-wing groups marking the anniversary of the October Revolution of 1917 (Kyiv, 6 November). It should be noted that all these bans applied to both the demonstration and counter-demonstration (more detail can be found under «Court restrictions on freedom of assembly»).

There were a number of unwarranted detentions during gatherings organized by opposition groups. For example, on 21 January, after a rally organized in Sevastopol by the National Front «Sevastopol-Crimea-Russia», one of the members of the Front, the leader of the Crimean youth organization «Proryv» [«Breakthrough»] Oleksy Dobychin and another leader of «Proryv» Oleksandr Dubrovsky were detained by members of a special unit of the police and taken by them to Simferopol, to the Central Department of the Crimean MI. After an interrogation lasting several hours and concerning, in particular, details about a rally organized by «Proryv» in the city of Perekop, the two men were released. They had not been allowed to notify their parents or friends about where they were. No charges were laid against Dobychin and Dubrovsky, and they therefore consider the incident to have been an attempt at intimidation.

According to information from the MIA Department of Public Safety, during lengthy protest actions in Feodosiya 24 people were detained. According to unofficial information which «Respublica» received from police officers, the Feodosiya law enforcement officers generally sympathized with the protesters and began detaining people only after insistent demands from the MIA management and the President's Secretariat. This would seemingly explain the fact that among the 24 people, 16 were detained for road offences (participants in the car rally in support of the protests), and 4

Russian Federation nationals detained for (as per the police protocol) «while on Ukrainian territory, they took an active part in a political rally and chanted anti-Ukrainian and anti-State slogans». The lack of grounds for detaining these four is shown by the fact that the local court in Feodosiya found no grounds for punishing them since neither their being on Ukrainian territory (there is a visa-free regime between Ukraine and Russia), nor their participation in a political rally (including active participation), nor the slogans (slogans against the President or against Ukraine joining NATO are not prohibited in Ukraine) constituted any crime. According to information from the opposition, the head of the Feodosiya police was dismissed in June 2006 effectively because he refused to obey an instruction from the MIA management to disperse protesters without a court warrant.

It should, however, be mentioned that the participants in the Feodosiya protests used force to stop members of the party «Pora» hold a counter-demonstration, and they returned under police guard to the coach which had brought them to the Crimea from Kyiv.

There were also no grounds for detaining members of the meetings mentioned early on 21 March in Kyiv and 21 October in Koncha-Zaspa.

According to police figures, 56 people were detained during the events of 15 October in Kyiv, the most notable in terms of violations of the right to peaceful assembly during 2006 in Ukraine. Prior to that, on 14 October, the Shevchenkivsky District Court in Kyiv had banned three political forces from holding any actions in the centre of the capital: the All-Ukrainian Association «Svoboda» (supporters of UPA), the Communist Party (opponents of UPA) and the Chernobyl Committee (with no connection to the UPA – the party had planned to hold a protest action with non-political social demands). The only grounds for the court ban was that a counter-demonstration was planned, which contravenes not only the Ukrainian Constitution, but also the case law of the European Court of Human Rights.

In the evening of that day the police, accompanied by the then Minister of Internal Affairs Yury Lutsenko, without a court order (since the 14 October ruling concerned only the meetings planned for 15 October), dismantled the tent city previously erected by UPA supporters on Kyiv's central square.

On 15 October in the morning the police, using special cordons blocked off the entire central part of Kyiv, Khreshchatyk (Street), Maidan Nezalezhnosti [Independence Square] and adjoining streets, with MIA officials asserting that this was in enforcement of the court ruling. Kyiv looked like a city under siege. Members of the public with no relation to the actions either in support of UPA or against it could not get to the metro, the Central Post Office, trolleybus stops and so forth. Their freedom of movement was thus restricted. It proved impossible not only for the civic association «Svoboda» and the Communist Party to hold their events on Khreshchatyk and Maidan, but also the Bloc of Natalya Vitrenko and a number of right-wing organizations which the court had not prohibited from gathering on Maidan. They all held their rallies along the police cordons.

Despite the police «security» measures which more likely provoked clashes, the events did not pass without run-ins. According to information from participants in the events representing different political forces, more than 56 people were detained. Some of those who took part, for example, Oleh Buryachok, a member of UNA – UNSD [the Ukrainian National Assembly – Ukrainian National Self-Defence] received serious injuries. The next day, following the intervention of human rights organizations, those detained were released.

The then Minister of the MIA Y. Lutsenko, commenting on such measures for obstructing political rallies unprecedented in Ukraine's modern history, stated that after the measures applied by the police on 15 October, different political forces would gather in different places, thus avoiding clashes.

The «Respublica» Institute considers that such police measures could lead to a situation where if different groups are planning a counter-demonstration, the centre of the capital will always be blocked for members of the public. It could even mean that no political rallies and demonstrations will be able to take place in the centre of Kyiv.[5]

However after the top leaders of the MIA were changed on 1 December, the police stopped obstructing any counter-demonstrations, even where there was a court ban. In the most fraught

[5] For more details on this, see: «A police state in Ukraine?» http://www.helsinki.org.ua/en/index.php?id=1161071797.

situations, the police forced a chain between the opposing demonstrations. Clashes have thus fair been avoided.

2.3. INFRINGEMENTS OF THE RIGHTS OF PEOPLE TAKING PART IN PEACEFUL GATHERINGS WITH SOCIAL DEMANDS

Another kind of gathering is that of meetings with demands of a social nature. The organizers of such meetings are, as a rule, civic non-political organizations. Unlike 2005 when the majority of such demands concerned stopping what the participants saw as illegal construction work in cities, the slogans and demands voiced at social actions had a more varied nature. Examples of such meetings are the above-mentioned picket near the President's dacha at Koncha-Zaspa and Freedom March.

During 2006 the number of infringements of freedom of assembly with regard to actions with social demands was greater than in 2005. This can be explained by the fact that the demands began touching the interests of the leaders of the country and the local authorities to a greater extent.

Freedom March is an international action aimed at drawing public attention to discrimination against drug users and to the issue of decriminalizing the use of soft drugs. Given the controversial issues of the event planned for 6 May, its organizer – the civic initiative «Objective reality» had informed the Kyiv City State Administration (KCSA) about the planned march in advance, on 13 April. This was specifically in order to coordinate all issues which could arise during the action with the KCSA and the police. During the three-way negotiations (the KCSA, police and organizers), the latter agreed to suggestions on changing both the time and the route of the March. Yet on 4 May the then head of the Kyiv Police Vitaly Yarema asked the KCSA to lodge an application with the court to ban the March since other organizations were planning their own actions at the same time and in his view, «there is a real danger of disturbances or crimes, and a risk to public health and the rights and liberties of other people». The religious organization «Assembly of God», which the Mayor Leonid Chernovetsky is connected with, had declared their intention to whole an action under banners opposing the legalization of soft drugs.

On 5 May the day before the event, clearly in order to prevent the March organizers from appealing against a ban, the application was lodged with the court. On the morning of the scheduled event, the Shevchenkivsky District Court, having considered the application from the KCSA, refused to ban the Freedom March, only restricting the organizers – Taras Ratushny and Anastasia Bezverka – from using sound amplifiers and from walking along the roads. This ruling was in keeping with case law of the European Court of Human Rights which does not consider the likelihood of counter-demonstrations to be sufficient grounds for banning a demonstration (*Judgment in the Case of the Platform «Дrzte fьr das Leben» [«Doctors for Life»] v. Austria)*

However the Kyiv police were not able to avert disruption to public order at the beginning of the event when counter-demonstrators, representing extreme right-wing nationalist organizations (UNA – UNSD, the Ukrainian Conservative Party and Ukrainian National Labour Party), which had only announced their action on the morning of 6 May attacked the March participants. Later the police obstructed the Freedom March by forming a ring around approximately 100 participants in the March (around 100 people) who had not demonstrated any aggression. At the same time the counter-demonstrators were not prevented from moving freely around St Michael Square, and even threw smoke bombs at the Freedom March people who had now become a convenient target. The police prevented approximately 50 people from joining the other participants inside the cordoned-off ring. They thus prevented them from carrying out the march even after its opponents had left the square and the danger of clashes had subsided.

In general observers pointed to a certain degree of coordination between police actions and the counter-demonstrators on that day. And the then Minister of Internal Affairs Yury Lutsenko said that if he hadn't been the Minister, he would have joined the opponents of the March.

In response to a question from the Institute «Respublica» as to why, against a court ruling, the police had obstructed a peaceful gathering, the Deputy Head of the Kyiv Police Lieutenant Vitaly Oshovsky said that he had personally taken the decision that the «March won't take place».

The case over obstruction by the authorities of a peaceful meeting gained wide publicity and a number of human rights and civic organizations, as well as public figures, issued a statement which said that such actions and statements by representatives of the police could testify to the imposition in Ukraine of a police state.[6]

2.4. COURT RESTRICTIONS ON FREEDOM OF PEACEFUL ASSEMBLY

In all cases analyzed by the Institute «Respublica», rulings by Ukrainian courts on restricting the right to peaceful assembly issued in 2006 were unwarranted or based on unconstitutional grounds, for example:

1. Decisions by bodies of local self-government which run counter to the Constitution of Ukraine (as discussed above).

2. The absolute majority of court bans on demonstrations in 2006 were based purely on the fact that a counter-demonstration was planned. This, in the view of both the applicants – the local authorities, and the court, presented «*the risk of disturbances or crimes, a risk to public health and the rights and liberties of other people*». Based on the results of «Respublica»s monitoring, we are forced to state that all court rulings passed in this manner lacked the grounds to which the judges referred in their rulings. They also ran counter to both the Constitution and to judgments passed down by the European Court of Human Rights.

The single exception to this negative practice was the ruling already mentioned handed down by the Shevchenkivsky District Court on 6 May 2006 which not only rejected the application from the authorities to ban a demonstration on the grounds that a counter-demonstration was planned, but also took into consideration, probably for the first time in Ukraine, provisions of the Law «On the application in Ukraine of the Convention for the Protection of Human Rights and Fundamental Freedoms and judgments of the European Court of Human Rights» which states that such judgments «*are a source of law*» in Ukraine (Article 17).

Of course, every demonstration, procession or other similar action, which is accompanied by a counter-demonstration, can lead to clashes and cause the law enforcement agencies a lot of problems. However, the European Court of Human Rights has confirmed that Article 11 should be understood as referring to the positive obligations of the State to defend those who are carrying out their rights to peaceful assembly free of violence from opponents, including from counter demonstrations (*the Case of the Platform «Ärzte für das Leben» v. Austria, 1985, Paragraphs 65 to 72*). Since both parties have the same right which is guaranteed by Article 11 of the European Convention, where one of the parties is aiming to disrupt the activity of the other, the authorities must in the first instance protect the rights of those who are carrying out their gathering peacefully: The European Court stated in its judgment:

«A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11».

In view of this, the widespread practice of prohibiting peaceful gatherings purely on the basis of the fact that peaceful meetings of two opposing sides will be held in one and the same place, cannot serve as justification for restricting the right to peaceful assembly. Such practice should be deemed to contravene European standards.

.In a lot of cases the courts disregarded the presumption of innocence in that their rulings restricted citizens' rights, i.e. punished them, not for real offences, but for the «likelihood» (in the view of the applicant and the court) of offences, in other words for offences they hadn't committed. All such bans were based on these grounds.

[6] The statement in Ukrainian is available at http://www.helsinki.org.ua/index.php?id=1147355900.

If in 2005 we pointed to positive trends which had emerged in the attitude of the courts to freedom of assembly, with courts, even those which had previously imposed unwarranted restrictions on freedom of assembly, beginning to hand down judgments in compliance with the Constitution. (the same Shevchenkivsky District Court in Kyiv), with regard to 2006 we are forced to note the opposite trend. For example, whereas in October 2005 the Shevchenkivsky District Court rejected an application from the Kyiv City State Administration to ban rallies of both the supporters and opponents of recognizing the UPA as having fought for Ukraine in the Second World War on the grounds that the rallies were scheduled for the same place and time, in an analogous situation in October 2006 the same court ruled to ban both rallies. This court passed similar rulings on a number of occasions in 2006 (for example, on 6 November).

Decisions to restrict the right to peaceful assembly are, as a rule, taken the day before mass events. This means that the organizers are not given the opportunity to appeal the decision of district courts before the beginning of the event and, they are thus effectively deprived of the chance to reinstate their constitutional right to peaceful assembly.

Nonetheless one positive trend did emerge in 2006 with regard to court rulings on freedom of assembly. Not one ruling was recorded banning «small architectural forms». However, as mentioned above, in the absence of such judgments the local authorities applied administrative extrajudicial prohibitions.

3. CONCLUSIONS AND RECOMMENDATIONS

Despite the lack of domestic legislation, courts do not generally apply case law of the European Court of Human Rights, but instead use norms established by unconstitutional rulings of local authorities. As a result of this, the majority of rulings of national courts, especially those of first instance, contravene Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

We are forced to note a negative trend in court rulings pertaining to freedom of assembly as against 2005. First instance courts (for example, the Shevchenkivsky District Court in Kyiv), even where they had previously turned down applications from the local authorities to ban political rallies where the applications were based on unconstitutional grounds (for example, the fact that a counter-demonstration was planned), began accepting such grounds and banning rallies in 2006.

The practice also became more widespread in 2006 of applying extrajudicial bans on «small architectural forms» (i.e. banning peaceful gatherings taking place in the form of tent cities) through the use of «instructions» from municipal services.

Courts of first instance, in the majority of cases, grant applications from the authorities to prohibit the holding of peaceful gatherings. Reviews of appeals against the «automatic» rulings of first instance courts drag on for several months making it impossible to effectively defend and reinstate the right which has been violated. It is moreover impossible to demand compensation for losses incurred by the passing of such rulings since illegitimate rulings of courts of first instance are largely reversed by the appeal courts.

We would also note the large number of court rulings prohibiting peaceful gatherings passed the day before they are due to take place, this eliminating the possibility of appealing such a ruling, and also resulting in the postponement of such actions which creates additional conflict.

The State, as represented by law enforcement agencies (the police) does not fulfil its positive obligations in accordance with Article 11 of the European Convention, in particular, as regards creating the conditions for holding peaceful gatherings and ensuring law and order. At the slightest even hypothetical suggestion that there could be a threat to public order the courts ban these events, especially when a demonstration or other mass actions by the opposition are involved.

One should also note that law enforcement agencies often unwarrantedly detain activists and those attending peaceful gatherings (the number of such detentions and administrative penalties almost quadrupled in comparison with 2005). They also use excessive force to disperse peaceful

gatherings, and apply levels of suppression to peaceful individuals which are disproportionate to the threat to public order presented.

In general, the authorities cannot establish a blanket ban on peaceful assembly in this or that specific place. Administrative practice in Ukraine demonstrates that bodies of local self-government pass separate normative acts (which, incidentally, does not fall within their authority and contravenes the Constitution of Ukraine) which prohibit the holding of any public and peaceful mass actions in the centres of populated areas. They then provide places for holding political rallies and demonstrations on the outskirts of the city or in stadiums which contradicts the very essence of the right to peaceful gatherings. The development in court practice of quashing such acts passed by the local authorities can however be welcomed.

In view of the above, legal means need to be legislated for protecting the rights of individuals to freedom of peaceful assembly.

A positive move was observed at the end of 2006 in the attitude of the police to freedom of assembly. This was seen in the fact that the police no longer enforced extrajudicial «instructions» from the municipal services and did not obstruct counter-demonstrations. Also throughout 2006 the police cooperated with human rights organizations via the public human rights councils attached both to the Ministry of Internal Affairs, and to local departments of the MIA. As a result, from December 2006 the practice of dispersing meetings was stopped. There were virtually no clashes during meetings either between participants and the police, or between members of a demonstration and counter-demonstration, and the number of participants in gatherings significantly decreased.

RECOMMENDATIONS

1. Draw up instructions for law enforcement agencies regulating their behaviour during peaceful gatherings.

2. Carry out training of officers from special units and patrol squads of law enforcement agencies in the following: ensuring public order during peaceful gatherings; protecting those participating in peaceful gatherings; the grounds and conditions for using special means and physical force; ensuring independent control over how they use their authority during peaceful gatherings

3. Translate into Ukrainian the Judgments of the European Court of Human Rights on Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms pertaining to the freedom of peaceful assembly and provide copies of these translations to all local and appellate administrative courts.

4. Taking into account case law of the European Court of Human Rights, prepare and run a training course for judges of local and appeal courts of all 27 regions of Ukraine as to applying Article 11 of the European Convention for the Protection of Human Rights in court practice with regard to applications from the authorities to ban peaceful gatherings.

5. It would be useful for the Supreme Court of Ukraine to provide general principles for court rulings in cases involving restrictions on the right to free assembly and demonstrations.

6. Pass a draft law on holding peaceful gatherings drawn up by Ukrainian human rights organizations in which the case law of the European Convention for the Protection of Human Rights and the positive practices in democratic countries are taken into consideration.

7. Bodies of local self-government and public authorities should revoke any Regulations on rules and procedure for holding peaceful gatherings and using «small architectural forms» and bring other decisions into compliance with the Ukrainian Constitution and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Prosecutor's Office of Ukraine should appeal through court procedure such decisions of local authorities where the latter have failed to respond.

8. The Human Rights Ombudsperson should pay more attention to infringements by local authorities and law enforcement agencies of the right to peaceful assembly.

9. Organizers of peaceful gatherings are advised to use court procedure to complain against any rulings by first instance courts restricting freedom of peaceful gatherings, and also against illegal actions of law enforcement bodies. The Institute «Republic» and the Ukrainian Helsinki Human Rights Union give such cases priority when providing legal assistance.

X. FREEDOM OF ASSOCIATION[1]

The situation as far as freedom of association is concerned did not change to any significant degree in 2006. Current legislation on associations, passed in the main at the beginning of the 1990s, has long failed to meet modern conditions and the needs of a civic society. The main problems remain as follows:

– Legislation does not allow for the possibility of registering certain types of organizations. This applies, for example, to socially beneficial organizations which are not essentially charitable, and whose work is not confined to only defending their own rights and interests, this preventing them from being classified as civic organizations;

– Obstacles when registering associations as well as with receiving non-profit-making status and the related tax concessions;

– Restrictions on types of associations' activities with regard to where they can be carried out (for example, a ban on activities in another city or region where the organization is not registered);

– Restrictions on kinds of activities (for example. limitations on publishing activities, access to information, defending other people's rights, etc);

– Lack of incentives in legislation and administrative practice for strengthening and developing associations and improving their cooperation with the authorities. While this issue does not directly concern the right to freedom of association, it is one of the important factors for evaluating the level of development of democracy in the country.[2]

Numerous provisions in Ukrainian legislation, including the above-mentioned, fail to comply with Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 22 of the International Covenant on Civil and Political Rights and other international agreements to which Ukrainian is a signatory.

As of November 2006, the following were registered with the Ministry of Justice: 1,791 nationwide civic organizations. These included 114 trade unions or their branches, 9 employers' associations; 137 associations based on national or friends' contacts. 153 youth organizations; 13 children's organizations; 45 women's organizations; 77 associations of veterans or of people with disabilities; 412 professional organizations, 56 environmental groups; 3 associations for preserving historic or cultural monuments; 332 health or physical exercise and sporting associations, 36 groups for protecting the population against the consequences of the accident at the Chernobyl Nuclear Power Plant; 153 creative organizations, 168 educational and cultural upbringing associations.

In 2006 the Ministry of Justice registered 211 civic organizations (against 181 in 2005); 12 political parties (against 24); 11 branches, departments, representations of civic organizations of foreign states in Ukraine (against 13); 82 charities (against 67); the symbols of 26 civic associations (against 32); 9 permanently functioning arbitration courts (9); 54 civic organizations received legal status through providing notification of their formation (against 31).

Regional bodies of the Ministry of Justice legalized over 2.2 thousand local citizens' associations (against 2.4 thousand in 2005); over 1.1 thousand branches of nationwide and international

[1] Prepared by Volodymyr Yavorsky, Executive Director of the UHHRU

[2] For a more detailed discussion of these issues, see the Reports «Human Rights in Ukraine – 2004» and «Human Rights in Ukraine – 2005», which can be found at the UHHRU website www.helsinki.org.ua. Since the situation has not changed markedly, the conclusions in those reports entirely reflect the present situation.

civic organizations (against 1,000); around 7.2 thousand structural bodies (against 49.7 thousand) of political parties, and approximately 13.2 thousand (against 50 thousand) other original branches received legal status through providing notification of their formation. 700 local charities were registered (700 also in 2005), as well as 64 permanently functioning arbitration courts (against 53), 125 trade unions and their associations (against 75), while notification was recorded from around 850 (against 856) organizations of nationwide trade unions.

Overall, according to the Ministry of Justice and the Single State Register of Citizens' Associations and Charities, the number of registrations fell by 23.7% in 2006 against 2005.[3]

According to researchers from the Counterpart Creative Centre, there were in total around four thousand active organizations in Ukraine during 2006, with the others effectively non-functional[4]

In 2006 the Single State Register of Citizens' Associations and Charities had still not become fully functional. The work on drawing up and implementing a modernised version of the Single State Register and transferring data to this version, envisaged in the Ministry's plan of work for 2006, was not carried out. On condition of clear stipulation of the source of financing for the relevant work, the Ministry is planning to carry out this task in the first half of 2007. There is a problem of public access to information contained in this register.

A positive feature last year was the lack of any prohibition on non-profit making organizations receiving money from their main work. During 2004 and 2005, the Law on the State Budget had suspended the relevant provisions of the Law on taxation of business profits[5] However, throughout 2006, the full range of tax benefits for non-profit making organizations allowed by legislation were applied. At the same time, there are a number of difficulties in applying these provisions with most civic organizations trying to avoid such activities and not receiving income from their own work. This means that virtually all nongovernmental organizations function thanks to charitable donations and (non-repayable) financial assistance.

1. CITIZENS' ASSOCIATIONS

During 2006 the Ministry of Justice prepared a new version of the Law on Civic Associations (in the current version this is «On Citizens' Associations»). At the same time a working group was created with representatives of civic organizations in order to prepare comments and proposals on the draft law[6]. Over the last year a number of meetings took place between the public working group and representatives of the Ministry of Justice. Yet it was only in March 2007 that the Ministry agreed to virtually all the proposals made by the public.

Although there has been a reduction in the problems experienced in registering associations, these still arise.

On 19 October 2007 the Law «On Amendments and Supplements to the Law of Ukraine «On State registration of legal entities and individuals – entrepreneurs» came into force (Law № 3575-IV from 16 March 2006). This law makes an attempt to simplify the registration procedure for citizens' associations, political parties, charities, creative unions, lawyers' associations, trade and industry chambers, etc. Article 3 of the Law has been supplemented with a new fourth paragraph which obliges the

[3] According to the Ministry of Justice Report on implementation of the 2006 working plan which is available in Ukrainian at the Ministry website: http://www.minjust.gov.ua/0/news/8989.

[4] The state and rate of development of nongovernmental organizations in Ukraine (2000-2006), Report on research from the charitable foundation «Counterpart», 2006 – p. 18. Active organizations are understood to mean registered organizations existing for more than two years, which have experience of carrying out at least 2 programmes or projects, have successfully fulfilled projects and are known in their region. .

[5] This refers to the provisions of paragraphs 2.7, 11 and 13 of the Law «On taxation of business profits» in the following version: «The main activities shall include the sale by a non-profit making organization of commodities (services) which espouse the principles and ideas which the non-profit making organization was created to defend, and which are closely connected with their main activities, if the price of such commodities (services) is lower than the usual price or where such a price is regulated by the State».

[6] The given working group was engaged in drawing up a Public Sector Doctrine aimed at building a favourable legislative environment for associations. More information about the makeup and activities of the working group can be found at: http://doktryna.civicua.org/docs/workgroup.html.

Ministry of Justice to also issue a certificate of State registration of the legal entity recorded by the State Registrar.

The State Committee on Regulatory Policy and Business and the Ministry of Justice approved Regulations for passing information from offices of the Ministry to the State Registrar in order to register the certificate of State registration of the legal entity (hereafter the Regulations). These Regulations define the rules of procedure for interaction between the offices of the Ministry and the State Registrar with regard to passing on information about the registered citizens' associations (these including legalized trade unions and their associations), charities, political parties, creative unions, territorial (local) centres of these legal entities, lawyers' associations, trade and industry chambers, other institutions and organizations, defined by law (hereafter civic formations).

Following registration by the Ministry of Justice or its territorial body of the civic formation, its founders or authorized representatives fill in data regarding registration provided in the form of registration cards approved by Order of the State Committee on Regulatory Policy and Business from 9 June 2004 No. 67 «On approving forms for registration cards». The Ministry or its territorial office during the next working day after receiving the completed registration card passes the card to the State Registrar of the relevant executive committee of the city council of a town with regional significance, district or district administration within the cities of Kyiv and Sevastopol. The State Register on the day that the registration card is received adds a note to the Single State Register of Legal Entities that the relevant registration has been carried out, prepares a certificate as prescribed by the Law and passes this to the Ministry of Justice or its territorial body. The certificate of State registration of the legal entity may be issued by the State Register to applicants at their written request.

Citizens' associations (including trade unions), charities, political parties, local branches of registered nationwide or international organizations which are legal entities and were registered before the Law on Amendments and Supplements to the Law of Ukraine «On State registration of legal entities and individuals – entrepreneurs» came into force directly submit to the State Registrar a copy of the document confirming their inclusion in the Single State Register of Businesses and Organizations of Ukraine [hereafter SSRBOU) and the completed registration card using form No. 6.

The mechanism outlined above for passing on information simplified the State registration procedure for the legal entities listed through the removal of additional registration fees, as well as in enabling founders or their authorized representatives to receive a certificate of State registration of a civic formation.

However the Law «On State registration of legal entities and individuals – entrepreneurs» in the current version rather than simplifying, actually complicates the procedure for State registration of particular types of non-profit making legal entities, in particular political parties, charities, civic organizations, lawyers' associations, creative unions, their territorial branches, trade and industry chambers, etc, since it envisages double registration which hampers the formation of civic society organizations.

Therefore the highest-priority task in 2007 is to pass the Law «On amendments to some laws of Ukraine on registration of legal entities», which places the functions of the State Registrar of civic organizations into the competence of the Ministry of Justice. The specific features in registration of such organizations is set out in Article 3 of the Law, i.e. the issuing of one certificate on State registration and only one registration fee (the draft law was submitted for agreeing to the Ministry of the Economy, the Ministry of Finance and the Ministry of Labour on 29 December 2006.

However the difficulty of registration of citizens' associations cannot be attributed only to the exceptionally bureaucratic procedure for registration in the Ministry of Justice or its territorial offices. Many problems arise at the next stage, i.e. when the civic organization is registered with the State Tax Administration and entered on the Register of non-profit making organizations in order to receive a favourable taxation and tax reporting status.

We can cite what seems to us a classic example of a dispute over adding a civic organization onto the Register of non-profit making organizations, this being carried out by the relevant tax administration providing certain tax benefits for such an organization.

A judgment on 24 May 2006 by the High Administration Court of Ukraine rejected the cassation appeal from the Specialised State Tax Inspectorate in the Prymorsky District of Odessa against the ruling of

the Odessa Regional Economic Court from 5 September 2005 and the judgment of the Odessa Economic Court of Appeal from 15 November 2005 in the suit lodged by the Odessa regional civic organization «The sport dancing club «Ah, Odessa».

The first instance and appeal courts established that on 24 February 2005 the Odessa Regional Department of Justice under registration No. 901 had registered the civic organization SDC «Ah, Odessa» as a legal entity. On 10 March 2005 under No. 15,442 the Club had been added to the register of taxpayers[7].

In August 2005 the Odessa regional civic organization «The sport dancing club «Ah, Odessa». (hereafter «Ah, Odessa» or the claimant) filed a suit in the economic court against the Specialised State Tax Inspectorate in the Prymorsky District of Odessa (hereafter the Tax Inspectorate, or the respondent) demanding that the decision taken by the tax body No. 42-15-0122 from 24 March 2005 «On refusing to include the claimant in the Register of non-profit making organizations (institutions)» be declared null and void, and that the tax body be ordered to register the claimant in the Register of non-profit making organizations (institutions) on 24 March 2005 under the code 0006.

In providing grounds for the claim, the claimant stated that on the basis of a review of the application on form 1-RN, the respondent had taken the decision to turn down the application to have the Club included on the Register of non-profit making organizations. The grounds given were that the norms of paragraph 8: 2.2 point 2 and paragraph 26 2.3 point 2 of the Statute of the Club «Ah, Odessa» did not comply with the requirements of Article 7.11 of the Law «On taxation of business profits». The claimant considers that the Tax Inspectorate's decision was taken with serious infringements of current legislation and unwarrantedly violated the claimant's right to tax concessions.

A ruling by the Odessa Regional Economic Court from 5 September 2005 which was upheld in the judgment issued by the Odessa Economic Court of Appeal from 15 November 2005 allowed in full the demands of the Club «Ah, Odessa».

The High Administration Court confirmed that the norms of the Statute which the claimant had referred to in their letter of 28 September 2005 concerned the issue of expenditure by a civic organization which was in no way confined to the Law «On taxation of business profits».

We thus see that as a result of the arbitrary interpretation of legislation, with the representatives of the State Tax Administration being unable to understand that the given provisions did not relate to the sources of income of the organization, the organization was prevented from functioning normally for a year and a half.

The Law «On youth and children's civic organizations» has finally been brought into compliance with the Constitution. The law defines the specific features of the organizational and legal principles for the creation and activity of youth and children's civic organizations, as well as the government guarantees for safeguarding their functioning. The Judgment of the Constitutional Court No. 18-rp/2001 from 13 December 2001 declared unconstitutional the provisions of this Law which stipulated the special status of the Ukrainian National Committee of Youth Organizations as the institution through which government financial support for the youth movement in Ukraine was provided. Due to this, back on 6 November 2002 National Deputies Y.O. Pavlenko, O.V. Petrov and V.Y. Khomutynnik submitted to the Verkhovna Rada Draft Law No. 2372 «On amendments to the Law of Ukraine «On youth and children's civic organizations»

The draft law proposed to remove from the Law those provisions which the Court had declared unconstitutional, namely:

– the norm which states that the Ukrainian National Committee of Youth Organizations is a union uniting the majority of legalized Ukrainian youth and children's civic organizations;

– the norm which stipulates that the youth movement in Ukraine shall be coordinated by the Ukrainian National Committee of Youth Organizations;

[7] It should be noted that in this case there is a classic infringement which admittedly none of the parties to the dispute noticed. The normative documents of the State Tax Administration stipulate that a taxpayer is registered by being added to the Register of non-profit making organizations. In practice however this never happens: at first all organizations are registered according to general procedure like all enterprises, and then over a month or even two the question of whether they should be added to the Register of non-profit making organizations is considered. This means that registration drags on for at least one more month.

– the norm which envisages that government financial support for the youth movement in Ukraine is provided via financing from the State Budget of the Ukrainian National Committee of Youth Organizations.

The draft law also proposes alternative procedure for financing the youth movement in Ukraine. This procedure involves transferring the function of organizing government financial support for youth and children's civic organizations to executive bodies which work with young people and bodies of local self-government.

The draft law was passed by Parliament at the beginning of 2007.

On 3 October 2006 National Deputy I. Herasymov registered Draft Law No. 2254 «On amendments to Article 4 of the Law of Ukraine «On fundamental principles of social protection for veterans of labour and other elderly people in Ukraine» (on providing financial assistance to civic organizations for veterans of labour). The draft law proposes allowing for the right of local authorities and bodies of local self-government to provide premises, buildings as well as other necessary property, for use without payment of communal charges. The draft law had not been considered at the end of 2006.

2. POLITICAL PARTIES

At the beginning of 2006, the Ministry of Justice website had information about 138 registered political parties in Ukraine. Over the year 12 political parties were registered (against 24 in 2005).

A number of problems exist with the functioning of political parties. The government attempts through different means to complicate the registration of new parties and the activities of those already existing in order to reduce them. It should be noted that the given measures, including increasing the number of signatures needed in support of a party are questionable from the point of view of the standards set down in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

It is effectively impossible to create a political party according to current legislation. On the one hand it is prohibited in the country for unregistered associations to function, while on the other – it is quite unclear how one can gain the signatures of 10 thousand supporters without engaging in any kind of activity.

In our view, political parties get registered purely because the authorities do not apply legislation in full, this demonstrating positive administrative practice which is better than current legislation.

During the first six months of 2006 the Ministry of Justice refused to register 2 political parties. There were no cases where the courts were used to prohibit the activities of political parties. The main grounds for refusing to register a party are not meeting the requirement in Article 10 of the Law «On political parties in Ukraine» to gather signatures of at least ten thousand citizens of Ukraine from at least two thirds of the regions, Kyiv, Sevastopol and the Autonomous Republic of the Crimea.[8]

On 20 January 2006 the National Deputy V.M. Oluyko tabled Draft Law No. 8744 «On amendments to the Law of Ukraine «On citizens' associations» (regarding the number of signatures from Ukrainian citizens supporting the formation of a political party). This envisages that the application to form a political party should be signed by ten thousand[9] Ukrainian citizens. However these amendments to the Law were not considered by the former parliamentary session which means that the draft law is rejected.

Yet by 12 January 2007 the National Deputies H.A. Savosin and Y.H. Zubko had introduced exactly the same draft law which has yet to be considered by parliament.

On 20 September 2006 the National Deputy B. Bezpaly tabled Draft Law No. 2198 «On amendments to the Law of Ukraine «On political parties in Ukraine» (on regulating the registration of

[8] Response from the Ministry of Justice to a formal request for information (letter No. 32-23928-c from 28.12.06). Available in Ukrainian on the «Maidan» website http://www.maidan.org.ua/static/news/2007/1168590254.html.

[9] The current version of the law states: «An application for registration of a political party must be supported by the signatures of no less than one thousand Ukrainian citizens entitled to vote». The given norm of the law on citizens' associations directly contradicts Article 10 of the Law on political parties which imposes such demands.

parties and overseeing their activities)». The draft law proposes significant amendments to the procedure for registering political parties.

In December 2006 the profile committee of the Verkhovna Rada on State construction, regional policy and local self-government issued a positive assessment recommending that the said Draft Law be accepted in its first reading. This led to a draft of the relevant parliamentary Resolution being registered however parliament has still not considered the Draft Law.

The dispute continued throughout 2006 over the creation of the political party «Narodny Soyuz Nasha Ukraina» [the People's Union Our Ukraine»].

In July 2005 Ms Y. filed a suit with the court against the inaction of the Ministry of Justice with regard to the registration of the political party «People's Union Our Ukraine» and called for the inaction of the Ministry in not carrying out the necessary check of material from the political party «People's Union Our Ukraine» submitted with the application to be declared unlawful. She asked that her legitimate rights and interests be protected and that the Ministry of Justice be ordered, in accordance with Article 24 of the Law «On political parties in Ukraine», to approach the Supreme Court with an application to annul the certificate from 22 March 2005 No. 115 of registration of the political party «People's Union Our Ukraine».

A ruling by the Pechersky District Court in Kyiv from 30 August 2005, upheld by the Kyiv Appeal Court in a ruling on 30 December 2005, terminated the proceedings in the case pursuant to Article 227 § 1 of the Civil Procedure Code (in the 1963 edition).

A ruling on 8 June 2006 by the High Administrative Court of Ukraine quashed the 30 December 2005 Ruling by the Kyiv Court of Appeal into the case and sent it back for another examination by an appeal court.

3. TRADE UNIONS

Freedom of association in a trade union, as well as being guaranteed by international norms regarding freedom of association, is also guaranteed by the International Labour Organization (ILO) Convention No. 87 Freedom of Association and Protection of the Right to Organize» which upholds the right of employees and employers to freely create their own organizations in order to put forward and defend their interests. The right of freedom of association in trade unions is enshrined also in Article 5 of the European Social Charter.

The crucial international principles involved in the right of freedom to organize in trade unions include the following:

– freedom of choice for employees and employers (whether to form one or several organizations at the workplace);

– association according to profession or according to field of work (the formation of a federation or confederation);

– independence and autonomy of organizations of employees and employers;

– prohibition of any discrimination in freedom of association in the area of work (with the exception of the armed forces and the police whose rights are set down in national legislation);

– the safeguarding by the government of the civil and political rights which the rights of the trade union are linked with;

– prohibition of government interference which could restrict freedom of association.

According to ILO standards, a component feature of freedom to organize in a trade union is the right to hold collective negotiations in order to reach collective agreements and the right to strike.

Guaranteeing freedom to organize in a trade union implies both types of duties for the government – negative and positive. The negative duty lies in not having any norms or administrative practice in domestic legislation restricting the freedom of employees or employers to create or join an organization. This means that the government must not prohibit workers (given the observance of certain conditions) from organizing trade unions at their own discretion. At the same time, the government may not force workers to join a trade union in accordance with the law, and must not interfere in the internal affairs of the trade union. The positive duty on the other hand implies that

the government is obliged to use relevant legislative or other means to guarantee observance of the right to create an organization and to protect such organizations from interference by employers.

At the beginning of 2007 information on the Ministry of Justice website stated that there were 104 all-Ukrainian trade unions registered, and 14 all-Ukrainian associations of trade unions, legalized by the Ministry of Justice.

There are a number of problems which are closely related to exercising the right of freedom to organize in trade unions, these being:

– problems with State registration;

– problems experienced by trade unions in carrying out their functions;

– various types of pressure from employers on the founders and members of trade unions;

In the course of monitoring observance of the labour rights of State sector employees, it was found that many institutions did not have protocols for forming initial trade union organizations, nor application forms for employees wishing to join these organizations and have their membership fees deducted. From the first day of work, an employee is automatically included in one of the trade unions and membership fees are charged. At the same time there are problems with the legalization of trade unions, and in the case of legalization, one has to wait months, and sometimes even years to receive the legalization documents. For example, as of March 2007 a case was awaiting examination in the Lviv Regional Court of Appeal on a suit lodged by the Sambir Free Trade Union of Education and Science against the Regional Department of Justice. The suit concerns the latter's refusal to legalize local trade union organizations, this being an overt violation of the right to freedom of association.[10]

The High Economic Court of Ukraine in its Resolution from 11 May 2006 rejected the cassation appeal of the Open Joint Stock Company on gas supplies and services «Poltavahaz» with regard to its suit against the Free Trade Union of Machinists of that business seeking to have the trade union's certificate of registration annulled.

The Open Joint Stock Company on gas supplies and services «Poltavahaz» had filed a suit with the Kyiv Economic Court against the Ukrainian Free Trade Union of Machinists calling for the cancellation of the registration of the initial organization of the Ukrainian Free Trade Union of Machinists according to its certificate from 8 June 2005 No. 36/1290. With this certificate the Free Trade Union of employees of the Open Joint Stock Company on gas supplies and services «Poltavahaz» of the National Joint Stock Company Naftohaz – Ukraina registered as an organizational part of the Ukrainian Free Trade Union of Machinists. The enterprise had, in this way, sought to put pressure on the trade union.

The Verkhovna Rada is planning to study the problems faced by trade unions through holding parliamentary hearings. On 11 January 2007 it passed a Resolution on holding such hearings in the Verkhovna Rada and instructed the parliamentary Committee on social policy and employment to organize hearings for April 2007 on the topic «The level of observance of the rights of trade unions and employers' organizations in accordance with the International Labour Organization Convention No. 87 «Freedom of Association and Protection of the Right to Organize»

On 8 September the National Deputy and leader of the trade union movement M. Volynets registered in the Verkhovna Rada Draft Law No. 2083 «On amendments to some laws of Ukraine (on registration of trade unions as legal entities)». It did not receive consideration in 2006. The Draft Law proposed introducing amendments to the Ukrainian Civil Code, the Law «On state registration of legal entities and individuals – entrepreneurs» and the Law «On trade unions, their rights and guarantees for their activities». The amendments and additions envisage that trade unions together with their organizations and associations of trade unions:

– shall be considered to be formed and take on the status of a legal entity and civil legal capacity from the moment that their charter (regulations) are approved at a statutory meeting, conference or congress.

– shall lose their civil legal capacity from the moment that their activities are terminated. The trade union shall inform the legalizing body of the termination of its activities within three days

[10] On the results of the project «Protecting labour rights of employees of the State sector in Ukraine», undertaken by the Free Trade Union of Education and Science of the Lviv region with the financial support of the International Renaissance Foundation. The Material was prepared by Andriy Sokolov and Olena Grabovska.

from when it was removed from the List of legalized trade unions, their organizations and associations of trade unions.

– shall not be liable to pay a fee for carrying out the legalization process.

Compulsory dissolution of a trade union or association of trade unions leads to the cancellation of the certificate on legalization and removal from the List of legalized trade unions, their organizations and associations of trade unions. They also lose the rights of a legal entity, and it is mandatory to inform the legalizing authority of this in the mass media.

The given legislative proposals are fairly contradictory since they change the moment from when a trade union is considered to be formed which would lead to a number of collisions in legislation.

On 25 May 2006 National Deputies O. Yukhnovsky, V. Tsushko and V. Shpak registered in parliament Draft Law No. 949 «On trade unions and inter-professional associations in the agricultural industry. However this draft law was withdrawn on 5 October.

4. CHECKS ON THE ACTIVITIES OF CITIZENS' ASSOCIATIONS

In 2006 checks on civic organizations by the authorities became more frequent.

The Ministry of Justice in 2006 carried out checks of more than 7 thousand civic organizations to ascertain whether they were complying with the provisions of their charters. These checks resulted in more than 800 written warnings (against 2005 when 4.9 thousand organizations were checked and 750 warnings issued).[11]

For example, the Ministry of Justice and its departments at local level made a mass scale check of the actual location of civic organizations based on the information contained in their charters.

As a result of this check the Minister of Justice Oleksandr Lavrynovych stated in November 2006 that the Ministry was unable to find at their registered addresses around one tenth of the all-Ukrainian civic organizations and associations. He added that soon the percentage of civic organizations not located, and thus, in his opinion, theoretically non-existent[12], could rise even further since by that time they had only checked those organizations which had been registered from 1990-1994.[13] However legislation does not provide for any penalties for the fact that an organization is not present at its legal address. As a result, the Ministry of Justice has no way of reacting to these infringements.

The Ministry of Justice also checked whether the activities of the civic organizations corresponded to those given in their charters.

For example, the Ministry issued a warning to the All-Ukrainian civic organization «National Committee on Combating Corruption» which points to the unacceptability of violations of legislative norms. The corresponding Ministry of Justice Order states that the warning was issued for violating the demands of the Law «On citizens' organizations» and of the Law «On cooperation». This was for carrying out measures to defend and represent the interests of individuals who are not members of the «National Committee on Combating Corruption», and the unlawful interference in the activities of consumers' associations and their unions.

The Press Service of the Ministry of Justice and the Department for legalization within the Ministry asserted that the grounds for the warning were an appeal to the Ministry by a legal entity who asked them to determine the lawfulness of the interference by the «National Committee on Combating Corruption» in the activities of consumers' associations and their unions. For example, letters were sent from the Head of the Committee to the newspaper «Komsomolskaya Pravda» and Ukropspilka [the Ukrainian Central Union of Consumers' associations]. These gave a negative assessment of the state of affairs as regards consumer cooperation and enclosed an authorization form for shareholders in consumers' associations to fill in, authorizing the «National Committee on Combating Corruption» to represent their interests

[11] According to the Report of the Ministry of Justice on implementation of the 2006 plan of work. Available in Ukrainian at the Ministry website: http://www.minjust.gov.ua/0/news/8989

[12] This assertion is clearly dubious from the point of view of the law (the time of suspension of a citizens' association), as well as of general standards of freedom of association which are in no way linked with the legal address of an organization. .

[13] More can be found on the UHHRU website: http://www.helsinki.org.ua/index.php?id=1163513437.

with the authorities, the law enforcement and judicial bodies. On the basis of the facts presented in the application, the Ministry of Justice found that the «National Committee on Combating Corruption» had infringed a number of articles of the Law «On citizens' associations» (for example, paragraph two of Article 8 and paragraph one of Article 20), and «On cooperation» {Article 8).The Ministry of Justice in their conclusions stressed that the task of establishing the veracity of the information which the Committee had published in the mass media was solely within the competence of the court, while investigations were the responsibility of the law enforcement agencies.[14]

Although the above-mentioned actions are indeed based on the requirements of the Law on citizens' associations, they illegitimately restrict freedom of association in the light of Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In 2006, the activities of associations were not only checked by the Ministry of Justice, but by the law enforcement agencies also.

For example n the Crimea, in the course of a criminal investigation concerning separatists, the Ministry of Internal Affairs (MIA) and the Security Service (SBU) carried out interrogations and house searches of activists of the Sevastopol youth organization «Proryv» [«Breakthrough»], known for its radical statements and actions. The Crimean police launched a criminal investigation on suspicion of seeking to undermine the territorial integrity and inviolability of Ukraine. According to the MIA, the police were planning to raise the possibility of having the civic organization stripped of its State registration and of deporting its leader Alexei Dobychyn, a Russian national, back to Russia. «Proryv» activists, led by Alexei Dobychyn, had in Syvashchi on 20 January held a symbolic action of separating the Crimea from mainland Ukraine, digging up around 10 metres of the isthmus and erecting border poles with the symbols of Russia and Ukraine. In an interview to Russian television journalists present at the protest action, the leaders of «Proryv» publicly called on the Russian authorities to return Crimea to Russia.

On the next day, Saturday 21 January, law enforcement officers detained Alexei Dobychyn and one other leader of «Proryv» Alexander Dubrovsky in Sevastopol and took them to Simferopol for questioning, releasing them after this. However the criminal file was then handed by the police to the SBU and on 25 January both men were questioned in the Crimean Central Department of the Ukrainian Security Service. On that same day SBU officers carried out a search of «Proryv's» office and in Alexei Dobychyn and Alexander Dubrovsky's flats in Sevastopol. However by the end of the year the investigation had not resulted in anything and the organization was continuing to function.[15]

Another incident worthy of note took place in Kherson.

On 13 December 2006 officers of the Kherson Regional Department on Fighting Organized Crime [UBOZ] summoned for questioning two leaders of the Kherson Regional youth organization «The Youth Centre for Regional Development». The law enforcement officers, as part of an «investigative check» asked about the organization, when it had been formed and were also interested in why Americans were interested in the problems of the youth of the Kherson region[16] What they clearly had in mind was the fact that in 2006 the non-profit making organization «The Youth Centre for Regional Development» had received a grant from the international civic organization «Freedom House – Ukraine» to carry out a project aimed at developing youth policy in the region.[17]

On 21 December UBOZ in a separate letter explained that the check was being carried out on the basis of the Law «On the organizational and legal basis for fighting organized crime» and made the following additional demands:

«In connection with the check, on the basis of Article 12 of the Law «On the organizational and legal basis for fighting organized crime» and sending for checks of № 16/5-1-7 from 13.12.2006, please provide certified copies of the following documents of the Kherson youth civic organization «Youth Centre for Regional Development»:

[14] See the UHHRU website http://www.helsinki.org.ua/index.php?id=1165837247.
[15] See : http://www.helsinki.org.ua/index.php?id=1138375270.
[16] Website of «Politychna Khersonshchyna» // http://www.politics.kherson.ua/?&lang=ukr&po=doc&doc_topic=709&menu_id=787&id=3986. Information also available on the forum site: http://www.nokia.20gigs.com/forum/viewtopic.php?id=82&p=1.
[17] See the commentary of the International civic organization «Freedom House – Ukraine» on the «Maidan» website http://maidan.org.ua/static/news/2006/1166900412.html

- *on State registration*
- *charter documents*
- *appointment of employees and their functional duties*
- *documents confirming receipt of financial assistance from State executive bodies, bodies of local self-government or other sources of financing for the period from 17.10.2005 to the present*
- *documents regulating relations («grants») and the receipt of financial assistance from foreign organizations for the period from 17.10.2005 to the present*
- *documents confirming the receipt of the said monies and their further use*
- *documents showing the ordering of State and local needs carried out (programmes, projects, measures) and the purpose-linked financing and material assets for the period from 17.10.2005 to the present*

The next day the Centre addressed a letter to UBOZ asking for an explanation of which specific documents they needed to provide, since from the list given it was hard to understand.

In response, on 22 December, a formal act was drawn up in the Centre's office of a control check which stated that UBOZ had been unable to carry out a check due to a refusal to provide documents. Then on 26 December UBOZ filed an application with the court to have all these documents removed, which the court allowed.

RESOLUTION ON REMOVAL OF DOCUMENTS

Kherson **26.12.2006**

Judge of the Komsomolsky District Court in Kherson S.A. Skoryk, having examined the application made by the UBOZ Division for the Kherson Regional Department of the MIA for permission to remove documents with material in order to check for adherence to current legislation by official representatives of the Kherson youth civic organization «Youth Centre for Regional Development» (Single State Register of Businesses and Organizations № 33824578) in using money received from foreign organizations to carry out programmes on the development of youth policy in the Kherson region –

HAS ESTABLISHED:

That the UBOZ Division for the Kherson Regional Department of the MIA, in accordance with the Laws of Ukraine «On the police» and «On the organizational and legal basis for fighting organized crime» is carrying out a check of adherence to current legislation by official representatives of the Kherson youth civic organization «Youth Centre for Regional Development» (SSRBOU № 33824578) in using money received from foreign organizations to carry out programmes on the development of youth policy in the Kherson region .

In the application, the issue is raised of the UBOZ Division for the Kherson Regional Department of the MIA being provided with documents from the Kherson youth civic organization «Youth Centre for Regional Development» needed to ascertain whether official representatives of the Centre have complied with the law.

Having studied the application and material for the check, bearing in mind that the official representatives of the given organization refused to provide the documents, despite the order for a check № 16/5–1–7 from13.12.2006 and the formal request to provide the documents № 16/5–1–3247, taking into consideration the fact that in order to carry out a proper check regarding compliance with legislation by official representatives of the Kherson youth civic organization «Youth Centre for Regional Development», being guided by Article 11.24 of the Law of Ukraine «On the police» and Article 12 of the Law «in using money received from foreign organizations to carry out programmes on the development of youth policy in the Kherson region

HAS RESOLVED:

1. To permit the UBOZ Division for the Kherson Regional Department of the MIA to remove the following documents from the Kherson youth civic organization «Youth Centre for Regional Development» (SSRBOU № 33824578) registered at the address: 117–2, flat 7, Shovkunenko Street, Kherson:

- documents on the appointment of employees and their functional duties
- documents confirming receipt of financial assistance from State executive bodies, bodies of local self–government or other sources of financing for the period from 17.10.2005 to the present
- documents regulating relations («grants») and the receipt of financial assistance from foreign organizations for the period from 17.10.2005 to the present
- documents confirming the receipt of the said monies and their further use
- documents showing the ordering of State and local needs carried out (programmes, projects, measures) and the purpose–linked financing and material assets for the period from 17.10.2005 to the present

The quality of this court ruling and its compliance with legislation are questionable, especially as regards the list of documents to be removed. Some of these documents never in fact existed.

On 29 December the documents were forcibly removed by UBOZ from the Centre's office.

National Deputy A. Pinchuk sent a formal Deputy's request for information to the Minister of Internal Affairs V. Tsushko, asking for a legal assessment of the actions of the Kherson UBOZ. The response from the MIA stated that UBOZ had acted within the framework of existing legislation.

The website «Maidan» published an article entitled «For Tsushko: continuing the story of the UBOZ onslaught on a civic organization», on the unlawful actions of officers of the UBOZ Division for the Kherson Regional Department of the MIA during a check into the activities of the Kherson youth civic organization «Youth Centre for Regional Development»

The department of internal security of the MIA in the region carried out an official check which established the following:

«An official investigation ascertained that there had been an infringement of criminal procedure legislation in the continuation of the given case. In particular, after the removal of the documentation, the police officers did not register the enforcement of a check into the activities of the «Youth Centre for Regional Development» in the Logbook for recording crimes and did not take the relevant procedural decision. The above mentioned infringements happened as the result of an inadequate legal of professionalism from the investigation officer, as well as the lack of proper control by the management over the work of its staff.

As a result, therefore, of the official investigation, a conclusion was sent to the Kherson Regional Department of the MIA regarding disciplinary proceedings to be brought against those responsible. The relevant decision was taken.

The material of the check into the activities of the Kherson youth civic organization «Youth Centre for Regional Development» was registered in the Logbook on 18.01.2007. At present, the check into this material is still continuing.

5. THE CASE OF KORETSKY AND OTHERS V. UKRAINE (№ 40269/02) IN THE EUROPEAN COURT OF HUMAN RIGHTS[18]

During 2006 there was movement in the European Court of Human Rights on considering the case based on a claim brought by Serhiy Koretsky, Andriy Horbal, Oleksiy Lobytsky and Andriy Tolochko against Ukraine regarding the alleged violation of their right to freedom of association as guaranteed by Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

On 5 December 2006 the applicants held an official press conference in Ukraine where they gave details about the case.[19]

[18] Based on material provided by the civic organization «Article 11»: http://www.article11.org.ua.
[19] See information about the press conference on the UHHRU website http://www.helsinki.org.ua/index.php?id=1165332122. and in English at: http://khpg.org/en/index.php?id= 1165867484

This case is to some extent typical for Ukraine. The only unusual aspect is its development since the claimants, unlike the majority of Ukrainians decided to stand up for their right to freedom of association even at the expense of their own environmental work.

On 7 June 2000 four Ukrainian citizens decided to create a civic organization, «The Civic Committee for the preservation of the wild (indigenous) nature of Bereznyaky». On 27 July they submitted an application to have the association legalized. The Department of Justice for Kyiv, as always in such cases, made verbal comments regarding the wording of the aim and other provisions of the organization's Charter. The organization was prepared to accept some of the changes, but others they were not. They submitted a new version of the Charter however on 18 September 2000 the Kyiv Department of Justice refused to legalize the civic organization on the basis of the new version of the Charter.

The official grounds for the refusal were as follows:

- Two aims of the Committee in its Charter were given, whereas the law only allows for one;
- The Charter does not define the status of the organization and in other provisions it is stated that the Committee has the right to have representative officers in other cities of Ukraine, which does not comply ;with the restrictions of the law on an organization's activities according to its territory;
- The Charter mentions the use of volunteers for some of the work of the organization which violates the principle of equality of all members of the organization;
- The Charter envisages the carrying out of publishing activities, part of which according to legislation can only be carried out by business;
- The document proving payment of the registration fee was not attached, only a copy;
- Other violations of Ukrainian legislation.

It should be noted that while some of the criticisms made by the Department of Justice were in compliance with legislation, others were purely the result of a permission-based interpretation of legislative norms.

The founders lodged a claim with the court against the refusal to legalize their civic organization

On 13 March 2001 the Pechersky District Court in Kyiv rejected their claim against the Kyiv Department of Justice, and this ruling was upheld on 28 August 2001 by the Kyiv Court of Appeal. Later, on 14 March 2002, a panel of judges of the Ukrainian Supreme Court also upheld the rulings of the previous two courts.

The European Court of Human Rights received the application from the four men on 18 November 2002. In 2006 communication began over the case between the Secretariat of the European Court and the Government of Ukraine which shows that the application is being prepared for a decision as to whether to declare it admissible.

The given case is of enormous importance for Ukraine since the European Court of Human Rights will check whether the most crucial provisions of Ukrainian legislation on civic organizations meet the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This applies to:

– registration procedure;
– the requirements regarding the aim of an organization;
– territorial restrictions on the activities of an organization (the organization's status);
– restrictions on the types of activities for civic organizations, for example, publishing activities;
– responsibility for the activities of an unregistered association.

6. RECOMMENDATIONS

1. Adopt relevant legislation which would define clear and standardized conditions for the creation or termination of activity of all types of non-profit making organizations, including organizations, whose creation is not allowed for by Ukrainian legislation, as well as so that they can obtain the appropriate tax incentives through gaining the status of a non-profit making organization. This would entail the following:

– simplifying the registration procedure for nongovernmental organizations by creating one procedure for both non-profit making organizations and businesses;

– abolishing the territorial division of non-profit making organizations' activity and the restriction of their activity to the administrative-territorial unit they are registered in;

– abolishing. the strict division between associations created for their own members and those for others.

2. Adopt a Law «On amendments to some laws of Ukraine on registration of legal entities» which would transfer to the Ministry of Justice the functions of State registrar of civic organizations, the specific features in registering which are set out in Article 3 of the Law on registration of legal entities. To issue one certificate of State registration and have only one registration fee.

3. Introduce amendments to the Law on publishing activities in order to enable non-profit making organizations, and not only businesses, to establish publishing houses.

4. Review the restrictions on creating political parties.

5. Abolish the practice of licensing social services which are provided by non-profit making organizations, and not from State or local authority budgets. To provide legislation stipulating the conditions under which the government pays for social services, and provides assistance to non-governmental non-profit making organizations

6. Stimulate charitable or other non-profit-making activity by providing tax incentives solely on condition that charitable or other socially significant activity is carried out, and not by virtue of having created a specific type of organization which may not even provide such services.

7. Make more transparent the provision and use of government funding directed towards citizens' associations for carrying out state programs

8. Remove Article 186-5 which establishes liability for the activity of unregistered civic organizations from the Code of Administrative Offences

9. Sign and ratify the Convention on recognizing the legal identity of international non-governmental organizations (ETS № 124) that came into force on January 1, 1991

10. Strengthen mechanisms of cooperation and consultation between public authorities and bodies of local self-government at all levels and citizens' associations in developing government policy in various areas, and also in their implementation and in the creation of normative acts.

XI. THE RIGHT TO FREEDOM OF MOVEMENT AND FREEDOM TO CHOOSE ONE'S PLACE OF RESIDENCE[1]

In general, protection by the State of freedom of movement and freedom to choose one's place of residence complies with international standards, for example, Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. No significant changes took place in 2006, although there was some progress in guaranteeing freedom to choose one's place of residence and in safeguarding the rights of the Homeless[2]

1. FREEDOM OF MOVEMENT

Restrictions on freedom of movement can be established with regard to:

a) movement within Ukraine's borders;

b) international movement (travel from or to Ukraine).

The requirement of «Ukrzalisnytsa» [Ukrainian Railways], imposed on the basis of a Resolution of the Cabinet of Ministers3 that travel documents (tickets) for rail transport be issued solely on the basis of documents providing a person's identification continued to effectively hinder freedom of movement. The tickets give the first and last names of the individual who is going to use the ticket, and the train conductor has the right to not let any other person than that indicated on the ticket onto the train. This requirement was made a little less strict through the amendments introduced to the relevant Resolution of the Cabinet of Ministers which made it possible to buy tickets on the basis of copies of documents providing identification. At the beginning of 2006, the Ministry of Internal Affairs (MIA) tried to have additional passport information added to the tickets, however this initiative was not carried through.

Something of an obstacle for travelling abroad remains the existence of a separate passport4 for travelling abroad given the lengthy period needed for obtaining one, the cost of the procedure and the shortcomings in the procedure for its issue.

In the first 10 months of 2006 territorial offices of the Service of Citizenship, Immigration and Individual Registration issued 758 thousand passports and 107 thousand travel documents for children. They also issued 23.5 thousand documents for citizens moving to live in another country, of

[1] Prepared by Volodymyr Yavorsky, UHHRU Executive Director.

[2] In view of the lack of change in legislation, a fuller understanding of the restrictions on freedom of movement and freedom to choose ones place of residence, see the relevant section of the Report: Human Rights in Ukraine – 2005», available at: www.helsinki.org.ua.

[3] Resolution of the Cabinet of Ministers of Ukraine «On the rules and procedure for providing rail transport services to citizens» from 19 March 1997 No. 252 (with amendments from 12 September 2002, 8 October 2004). See also Article 2.2.2 of the Order of the Ministry of Transport of Ukraine from 28 July 1998 No. 297 «On approving the Rules for transporting passengers, luggage, freight and post by Ukrainian railways» (with amendments and supplements introduced by Orders of the Ministry of Transport of Ukraine from 21 December 1999 No. 611, from 22 February 2001 No. 109, from 21 November № 831, from 14 July 2003 № 530, and Order of the Ministry of Transport and Communications of Ukraine from 6 December 2004 № 1069)

[4] Ukrainians have an internal 'passport' – a personal identification document, and, if they have specifically applied for one, a passport for travelling beyond Ukraine. In the following text, «passport» is used where the Ukrainian specifies that this is for travelling abroad. (*translator*)

these 4.8 thousand pensioners, 14.9 thousand other adults and 4 thousand children. 3,844 Ukrainian nationals returned permanently to Ukraine.5

The procedure for issuing passports remains unacceptable. Each city demands a different list of documents and in parallel payment is demanded for various types of services provided by State enterprises of the MIA. Although the MIA claims that such services are provided with the consent of the people involved, in fact without them, you can simply not get a passport, which makes them effectively compulsory. MIA agencies continue to unlawfully demand that people present documents proving they have no criminal record. They sometimes also demand copies of their insurance policy. You will not get a passport without the documents regardless of court rulings which have declared such practice illegal.

On 11 March 2004 the Kyiv Court of Appeal examined an appeal brought by Y.P Androsenko against the ruling of the Darnytsky District Court in Kyiv on a suit filed against the unlawful actions and inaction of officials from the Department of Citizenship and Individual Registration of the Darnytsa District in Kyiv. The latter had demanded that a «document on criminal records» be provided when applying for a passport, whereas this is not on the list of necessary documents approved by the Cabinet of Ministers. The Kyiv Court of Appeal revoked the Darnytsky District Court's ruling of 10 December 2003, finding the actions of the said officials unlawful and ordering that Mr Androsenko be issued with a passport. The Court of Appeal therefore recognized that only those documents envisaged in legislation could be demanded for receiving a passport.

In order to simplify the procedure for getting a passport, the MIA had amendments drawn up which were then approved by Resolution No. 580 of the Cabinet of Ministers from 27 April 2006. A person's birth certificate was removed from the list of documents needed, and the category of people was stipulated who have the right to not provide a document from the Tax Office with an identification number. In fact, the requirement to provide such a document contravenes the Law «On the State register of individuals paying taxes» which prohibits using this identification number for any other purpose than for taxation.

Human rights organizations pointed to considerable problems with the issue of passports during 2005 and 2006. Appeals were addressed to the MIA and its regional departments by the Ukrainian Helsinki Human Rights Union and the Vinnytsa Human Rights Group. The appeals identified difficulties in receiving a passport, when the MIA responses stated that all was being done in accordance with the law.[6]

Problems have remained with the issuing of a sailor's identification document which substitutes a passport for this group of citizens. Current legislation stipulates that a sailor's identification document is issued to a citizen of Ukraine by the captains of sea or river ports in Ukraine on the application of the sailor or the heads of the enterprises, institutions or organizations who have concluded a contract of employment with a sailor occupying any position on board a boat (with the exception of military vessels), registered on the territory of Ukraine or other states who are signatories to the 1958 Convention on sailors' identification documents

In order to obtain or to renew a sailor's identification document the port captain submits to the relevant regional departments of the Security Service of Ukraine (SBU) a request for information regarding access, access to state secrets, as well as whether any criminal investigations have been launched against the individual who has applied for this identification document. This means that it is effectively the SBU that gives permission to issue a sailor's identification document. Yet what connection with state secrets can the work of a sailor on a civilian vessel have? Such practice dates back to Soviet times when everything connected with work abroad was made secret. In our opinion, this relic of the Soviet system must be changed

In general the procedure for issuing sailors' identification documents for multiple trips abroad needs substantial revision.[7]

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[5] «The Passport Department assists citizens in exercising their right to freedom of movement and freedom to choose ones place of residence // Report on the MIA official website: http://www.kmu.gov.ua/mvs/control/uk.

[6] More details are available in the article «How people get passports in Ukraine» at: // сайт УГСПЛ: http://helsinki.org.ua/index.php?id=1155887755.

[7] See for example «The issuing of sailors' identification documents in Ukraine», I. Beznosenko «Yurydychny zhurnal» № 11, 2004 (in Ukrainian). Available at http://www.justinian.com.ua

Distribution of migrants in terms of migration flow and where they settle[8]

(people)

	2006			2005		
	Number of arrivals	Number of departures	Migration balance	Number of arrivals	Number of departures	Migration balance
	Town settlements and rural areas					
In total	765882	751637	14245	763222	758639	4583
Including:						
Movement within regions	440898	440898	x	439269	439269	x
Interregional movement	280757	280757	x	284373	284373	x
Inter-State migration	44227	29982	14245	39580	34997	4583
Of these:						
between countries of the CIS	33976	21270	12706	33444	21866	11578
between other countries	10251	8712	1539	6136	13131	−6995
	Town settlements					
In total	547922	499471	48451	556363	500669	55694
Including:						
Movement within regions	295814	277450	18364	302390	272093	30297
Interregional movement	216809	198619	18190	223489	200955	22534
Inter-State migration	35299	23402	11897	30484	27621	2863
Of these:						
between countries of the CIS	25444	16455	8989	24820	16741	8079
between other countries	9855	6947	2908	5664	10880	−5216
	Rural areas					
In total	217960	252166	−34206	206859	257970	−51111
Including:						
Movement within regions	145084	163448	−18364	136879	167176	−30297
Interregional movement	63948	82138	−18190	60884	83418	−22534
Inter-State migration	8928	6580	2348	9096	7376	1720
Of these:						
between countries of the CIS	8532	4815	3717	8624	5125	3499
between other countries	396	1765	−1369	472	2251	−1779

(per thousand of the population)

	2006			2005		
	Number of arrivals	Number of departures	Migration balance	Number of arrivals	Number of departures	Migration balance
	Town settlements and rural areas					
In total	16,4	16,1	0,3	16,2	16,1	0,1
Including:						
Movement within regions	9,4	9,4	x	9,4	9,4	x
Interregional movement	6,0	6,0	x	6,0	6,0	x
Inter-State migration	1,0	0,7	0,3	0,8	0,7	0,1
Of these:						
between countries of the CIS	0,8	0,5	0,3	0,7	0,5	0,2
between other countries	0,2	0,2	0,0	0,1	0,2	−0,1
	Town settlements					
In total	17,2	15,7	1,5	17,5	15,7	1,8
Including:						
Movement within regions	9,3	8,7	0,6	9,5	8,5	1,0
Interregional movement	6,8	6,3	0,5	7,0	6,3	0,7
Inter-State migration	1,1	0,7	0,4	1,0	0,9	0,1

[8] The demographic situation in Ukraine in 2006. Express − information from the State Committee of Statistics No. 30 from 15 February 2007. Available at the Committee's website:: www.ukrstat.gov.ua.

Of these:						
between countries of the CIS	0,8	0,5	0,3	0,8	0,5	0,3
between other countries	0,3	0,2	0,1	0,2	0,4	−0,2
	Rural areas					
In total	14,6	16,9	−2,3	13,6	17,0	−3,4
Including:						
Movement within regions	9,7	11,0	−1,3	9,0	11,0	−2,0
Interregional movement	4,3	5,5	−1,2	4,0	5,5	−1,5
Inter-State migration	0,6	0,4	0,2	0,6	0,5	0,1
Of these:						
between countries of the CIS	0,6	0,3	0,3	0,6	0,4	0,2
between other countries	0,0	0,1	−0,1	0,0	0,1	−0,1

According to figures from the Ukrainian State Border Guard Service and the State Committee of Statistics, in 2006 18,936,775 foreign nationals entered Ukraine. Their reasons for visiting Ukraine were as follows:

− business, work-related or diplomatic − 1 011 230 (foreign nationals)
− tourism − 1,210,156
− private − 16,552,159
− study − 45,262
− employment − 4,623
− immigration (permanent place of residence) − 15,778
− cultural and sport exchange, religious, others − 96,567

Most foreign nationals came from Russia (over 6 million); Poland (4 million); Moldova (3 million); Belarus (over 2 million) and Hungary (over 1 million.).[9]

The SBU reported that in order to prevent the activity in Ukraine of international terrorist organizations, in 2006 34 foreign nationals had been refused permission to enter the country, since the SBU believed them to be linked with such organizations, while another two foreign nationals had been deported for the same reason. In all, over 4 thousand foreign nationals were prevented from entering Ukraine, this including 186 people who were alleged to have links with Al-Quaeda or the Taliban Movement[10]

This report is strangely at odds with the information regarding the deportation of 11 Uzbek nationals in February 2006. Then, on 28 February, the same Maryna Ostapenko, on behalf of the SBU, in a live interview on TV 5 stated that: «These citizens of Uzbekistan belonged to an organization which, according to a resolution of the UN Security Council in 2001 has been declared terrorist. While in Ukraine between May and August last year, these citizens of Uzbekistan espoused the radical ideas of this organization among Ukrainian citizens»[11]

It thus remains unclear why it is stated that only two people and not eleven foreign nationals were deported in connection with the fight against terrorism. Of course it is possible that the SBU changed the grounds for the deportation however this is not known.[12]

2. FREEDOM OF CHOICE OF PLACE OF RESIDENCE

In general there is freedom of choice of place of residence in Ukraine however there are a number of shortcomings in the system of legal regulation which have remained from the days of «propiska» [«registration»][13].

[9] Information on the site of the State Department of Statistics : www.ukrstat.gov.ua.
[10] «There are no terrorists in Ukraine!» // MIGnews.com.ua: http://www.mignews.com.ua/categ186/articles/246402.html.
[11] See the Channel 5 website : http://5tv.com.ua/newsline/179/0/21846. (and in English: http://khpg.org/en/index.php?id=1141248265)
[12] The deportation of the Uzbek nationals is discussed in more detail in the section of this Report on Refugees.
[13] This was a permission-based system of registration, which the Constitutional Court in 2001 declared was in contravention of the Constitution of Ukraine (*translator*)

The problems are on two levels:

♦ The exercising of many rights and freedoms continues to depend on ones official place of registration;

♦ Citizens who do not have their own homes, and the number of such people is constantly rising, are not in most cases able to register at the place where they actually live due to an unwarrantedly narrow interpretation of the grounds for registration.

The first problem is effectively an indirect additional measure of compulsion by the authorities to obtain registration. Another form of such compulsion is the present administrative liability for residing somewhere without registration.

The ability to exercise many rights and freedoms solely in accordance with ones place of residence clearly dates from serfdom and the Soviet system of «propiska». Despite the general declaration n Article 2 of the Law of Ukraine «On freedom of movement and freedom to choose one's place of residence», the given system is basically still in force.

It is solely on the basis of place of registration that the civil rights envisaged by the Laws of Ukraine «On State social standards and State social guarantees», «On pensions», «On education», «On the fundamental principles of health care legislation in Ukraine», «On protection of the population from infectious diseases», «On employment of the population», etc can be exercised. Citizens without a place of residence and registration cannot update documents, find work, or receive medical and social assistance.

The problem is also that the legislators have neglected the actual social relations in Ukraine, narrowing the grounds for registration and dividing people into those who can register in their own flat, and those who cannot. Millions of Ukrainian citizens have, furthermore, ended up in this second group. For example, this includes people who may have normal work and rent accommodation in one of the regional centres. The absolute majority of such rent arrangements are illegal according to Ukrainian legislation. It is not worthwhile for either of the parties involved to make such an arrangement legal. In the case of the person letting this is because:

♦ s/he would have to pay tax on such agreements, have tax consultations and generally more dealings with the tax authorities;

♦ s/he could lose the right to receive State subsidies on the payment of communal charges;

♦ the registration of such agreements takes a certain amount of time due to substantial bureaucratic difficulties;

♦ there can be problems forcibly evicting a tenant who was registered in the flat, this being undertaken only on the basis of a court order and consequently requiring additional time and expense.

For the tenant official relations are undesirable since the above factors lead to a significant increase in rent.

In such situations the person lives, in terms of legislation, illegally. The legislators have simply ignored these people, classifying them as homeless people who really don't have a place to live. Most often these people register where they can do so, and not where they actually live.

THE CHOICE OF A PLACE OF RESIDENCE FOR HOMELESS PEOPLE

One needs to also consider the problem of the homeless in connection with freedom of choice of place of residence.

The homeless are not only those who really are living out on the street. The vulnerable group in this respect includes people who don't have registration, but who can at the moment still work and rent a flat, as well as those who do not have:

♦ a fixed place of residence;

♦ registration;

♦ identification documents.

In 2006 the Ministry of Employment, together with local executive bodies, civic organizations experienced in working with the homeless, established a phased model to enable homeless people to return or reintegrate into society; It involved:

♦ street work (social patrolling);

- registration (a centre for being registered);
- night shelters;
- reintegration centres;
- social hotels.

According to the Law «On the fundamental principles of social protection for the homeless and abandoned children» which came into force on 1 January 2006, the process is continuing for creating a single State system to ensure that homeless adults receive social services. Pursuant to the Law, a number of normative legal acts were passed, and a network of institutions begun. During the year the following were drawn up and passed:

Order of the Ministry of Employment and Social Policy of Ukraine «On approving standard provisions on institutions of social protection for homeless individuals and people released after being imprisoned», from 14 February 2006, No. 31:

– Standard provisions on a reintegration centre for the Homeless;

– Standard provisions on night shelters;

– Standard provisions on a social adaptation centre for individuals who have been released from imprisonment;

Resolution No. 404 of the Cabinet of Ministers from 30 March 2006 «On approving a standard provision on a registration centre for the Homeless;

Order No. 98 of the Ministry of Employment and Social Policy from 3 April 2006»

Order № 114 of the Ministry of Employment and Social Policy from 7 April 2006 instructed its regional departments:

- together with executive committees of cities with regional subordination and other cities where there is a problem with homelessness to ensure that registration centres for homeless people are created;
- to provide practical assistance in organizing their work;
- to begin registering homeless people and providing reports;
- to provide information to the Ministry of Employment about measures either taken or planned to create registration centres on a quarterly basis before the sixth day of the month when the report is due.

Last year statistical standards were also introduced which make it possible to estimate the number of people registered as homeless and the actions taken by the government towards them.

In accordance with the Laws «On freedom of movement and freedom to choose one's place of residence» and «On the fundamental principles of social protection for the homeless and abandoned children», MIA Order No. 600 «On approving Rules of Procedure for preparing and issuing Ukrainian citizens' passports» from 15.06.2006. The Order was registered in the Ministry of Justice on 7 July 2006 as № 804/12678.

In implementation of the Law «On the socially designated housing fund», a draft Resolution of the Cabinet of Ministers was drawn up «On approving the Rules of procedure for reinstating documents for people living in adult temporary shelters». The draft resolution was agreed with the interested central authorities and will in the near future be submitted for review to the Cabinet of Ministers.

RECOMMENDATIONS

1. In compliance with the Opinion of the Parliamentary Assembly of the Council of Europe (№ 190) on the entry of Ukraine to the Council of Europe, powers of registration of citizens, foreign nationals and stateless individuals should be passed to the Ministry of Justice of Ukraine.

2. Conclude the process of reform of legislation as regards registration, taking into account positive international experience and the Law «On freedom of movement and freedom to choose one's place of residence».

3. Complete a computerized record system of registration of citizens, using the best models applied in other countries and observing international standards for safeguarding human rights.

Such a system should be autonomous and not contain other personal data collected by other State authorities.

4. It would be expedient to consider broadening the grounds for registration (as was done, for example, in the Law on the electoral register) and also to review legislation in order to prevent being able to exercise ones rights depending on ones place of registration. The procedure for cancelling registration in private flats should also be simplified, and the inter-dependence of the fact of registration with the right to the given flat in the State and communal accommodation funds should be eliminated. Without these measures, it will be impossible to create a realistic system of registration.

5. Guarantee protection of personal data related to registration and movement of individuals; in order to ensure confidentiality of movements and to eliminate the possibility of illegal surveillance over the movements of an individual. This applies in particular to the database of Ukrainian Railways as regards those in possession of travel documents (tickets), with the access to this database not regulated by legislation.

6. Bring the activities of the MIA into compliance with legislation as regards issuing passports. This includes standardizing such procedure for the entire country and putting a stop to the unlawful demands imposed for additional documents (such as insurance policies, documents confirming the lack of a criminal record, documents giving an identification number, and papers confirming payment for supplementary services from MIA enterprises).

7. Improve the procedure for issuing sailors' identification documents, taking into account the provisions of the Constitution of Ukraine on freedom of movement and clearly defined grounds for limiting trips abroad.

8. Abolish the practice of restricting travel abroad for people having access to state secrets.

XII. SOME ASPECTS OF THE RIGHT TO PROTECTION FROM DISCRIMINATION AND INEQUALITY[1]

In this section we consider the problem of discrimination on the grounds of race, skin colour, ethnic origin and language, as well as some aspects of social discrimination. Religious discrimination is addressed in the section on freedom of conscience.

Two important points should be mentioned immediately. Firstly, Ukraine's Constitution and legislation proclaim equal rights for all. In theory, this should make the unit before you extremely short! Unfortunately, the very lack of precise legal definition of direct and indirect discrimination, as well as the largely declarative nature of many constitutional norms, makes it actually harder to fight discrimination and to ensure prosecution of those guilty of such acts.

There have been no improvements since we described the general situation in *Human Rights in Ukraine – 2004*. Legislation has not been changed and the problems identified at that time have not been resolved. The analysis, therefore, given at that time remains current. The main change is that tension between different ethnic, language and religious groups has increased.

1. A BRIEF OVERVIEW

For Ukraine the following problems linked with discrimination and inequality are most typical.

1. Equal access to education

Quality of education is to a large extent dependent on where people live, with rural schools lagging seriously behind those in urban areas. There are also problems of access for migrants and representatives of certain ethnic groups. The worst situation with regard to education is seen in places with a large number of Roma people, primarily in the Transcarpathian region. According to information from the Roma newspaper «Romany Yag», in the Transcarpathian region 83.7% of Roma children had received incomplete secondary education,; 14,5% – general secondary; 1,4% – a special vocational school and only 0.15% had a higher education.

2. Non-discrimination in the school curriculum and higher education programmes

- ♦ presentation of the role of minorities
- ♦ programmes for teaching various subjects, for example, history

Soviet stereotypes regarding certain national minorities, ethnic and religious groups find their way into course programmes and textbooks for humanitarian subjects, first and foremost, history.

3. Equal access to health care

Elderly people have worse access than people of working age. This is also a problem for Roma people, as well as people living in Ukraine but without Ukrainian citizenship, for example, people originally from Asia, Africa and the Caucuses.

4. Equal rights in employment, in particular:

- ♦ access to the labour market;
- ♦ working conditions;
- ♦ access to all levels of employment;
- ♦ conditions of dismissal.

[1] By Yevhen Zakharov, Co-Chair of KHPG and Head of the UHHRU Board

Principles of equality and non-discriminatory practice are most frequently infringed in this area. Those affected include formerly deported people who have returned to Ukraine, as well as members of certain groups, for example people from the Caucuses, Asia and Africa, Roma and others, as well as sexual minorities. Discrimination is also experienced on the grounds of gender and age with women having far more problems in looking for a job than men, and older people finding it harder to find work.

5. Equal rights to ownership and housing conditions, including:

- ♦ compensation for property;
- ♦ access to former property (reinstatement of rights);
- ♦ access to and quality of temporary accommodation in cases of loss, damage or occupation of property;
- ♦ privatization of land

This problem is, perhaps, most acute for members of the formerly deported peoples. It should be pointed out that they are not in an equal position to descendants of those once deprived of their property as «kulaks»2, who, at least in theory, have the right to get their property back in accordance with the Law «On the rehabilitation of victims of political repression». There are grounds for speaking of inequality with distribution of land in the Crimea where a large number of Crimean Tatars cannot take part in the process of privatization.

6. Equal access to social services

- ♦ access to social welfare and services (including for mothers and children), pensions, etc;
- ♦ access to basic facilities such as water, electricity and plumbing;
- ♦ equal rights to social and communal services.

The return of the families of those formerly deported has resulted in inequality with regard to living conditions and access to communal services. This problem also affects certain groups of those repressed on political grounds, but not rehabilitated. These are, for example, a large group of men convicted by Soviet courts before 1991 for refusing to do military service on religious grounds. These people do not receive compensation and benefits foreseen for those rehabilitated. The same applies to former soldiers in the Ukrainian Resistance Army (the UPA)[3] who have not to this day been rehabilitated.

Access to basic facilities – water, plumbing and heating – is considerably more limited for people in rural areas.

7. Equality of access to economic projects, in particular, participation in development projects

This problem concerns weakened ethnic groups unable to seek the financial assistance for their social, cultural and other needs, as well as the Crimean Tatars, who, on the contrary, present justified demands for a level of financing which the government is unable to provide.

8. Equality in issues involving citizenship, in particular, conditions for obtaining it.

One of the five conditions for receiving Ukrainian citizenship, proof that the person is not a citizen of another country, is quite often simply impossible to satisfy because of the threat to a person's life if he or she returns for the documents required to the country where they previously lived, or because of prohibitive fees for renouncing one's previous citizenship.

9. Equality in exercising the right to return (linked with the reinstatement of citizenship and travel documents, security, housing, employment, access to social services, reconciliation)

This problem again concerns members of deported groups who have returned to their original home.

10. Equal treatment from law enforcement officers;

- ♦ freedom from intimidation and the use of physical force;
- • treatment during arrest;
- • treatment while in custody

[2] «Kulaks» were more prosperous peasants. In the first decades of Soviet rule, they were treated as class enemies (although their wealth as such was relative, and sometimes they were simply good farmers with a little bit more than average). They were either murdered, sent to the GULAG or deported in the late 1920s and 1930s. (*translator)*

[3] The Ukrainian Resistance Army (UPA from the Ukrainian) was formed in 1942, mainly by Western Ukrainian nationalists. Its soldiers fought the Soviets, Nazis (and sometimes Poles) they saw as all being enemies. It went underground at the end of WWII, continuing to wage war against the Soviet powers until it was finally crushed in the 1950s. (*translator*)

The serious overall problem of torture and ill-treatment of detainees is exacerbated when those involved are from the Caucasus, Asia and Africa or are members of certain ethnic groups such as the Roma. One also sees prejudice towards members of sexual minorities, as well as to certain vulnerable groups such as drug addicts and people living with HIV with this resulting in discriminatory behaviour towards them. Members of these groups complain that the police constantly ignore violence against them, and sometimes abet it. As examples of discrimination one can mention the forced taking of fingerprints of certain ethnic groups (for example, the Roma) and en masse searches.

11. Equal treatment in pre-trial detention centres and in penal institutions

- the conditions of imprisonment;
- treatment by the personnel in penal institutions;.

Personnel in pre-trial detention centres and penal institutions are more brutal in their treatment of immigrants from the Caucasus, Asia and Africa or towards members of certain ethnic groups such as the Roma. Such treatment is also meted out to members of sexual minorities, as well as to certain vulnerable groups such as drug addicts and people living with HIV.

12. Equality in exercising the right to safety and personal security

- State protection against violence, harassment and intimidation;
- freedom from arbitrary arrest and detention.

Immigrants from the Caucasus, Asia and Africa, members of certain ethnic groups such as the Roma, sexual minorities, drug addicts and people living with HIV are more likely to face such arbitrary arrest than others.

13. Equality in exercising the right to freely vote and stand for electoral office, and the right to take part in government or bodies of local self-government

Representatives of the Crimean Tatars and some national minorities and ethnic groups complain that they do not have equal rights in this area, and demand the introduction of special quotas in the electoral system.

14. Equality in exercising the right to freedom of thought, conscience and religion

In different regions of Ukraine, different branches of the Orthodox and Greek Catholic Churches feel that they do not have equal rights. There is a lot of talk about discrimination; however the issue involved is more one of property than of freedom of conscience. There are some grounds for speaking of discrimination with regard to non-traditional religions, with this inequality varying from region to region.

15. Equality in exercising the right to freedom of expression

The ability of people living in small towns and rural areas to exercise their right to information is in marked contrast to that of people living in regional centres. There are areas in the country where there is access only to the radio, others where there is radio and the First National television channel. Access to the Internet and the quality of communications is also greatly dependent on where a person lives. This leads to considerable inequality in exercising the right to freedom of expression.

16. Equality of national cultures and languages

- the use of one's native language in public and private life;
- learning one's native language
- studying in one's native language;
- access to cultural values.

This is an enormously important issue requiring particular attention (it is addressed here later in the section).

2. LEGAL MECHANISMS FOR ENSURING PROTECTION FROM DISCRIMINATION AND INEQUALITY

In the modern world measures to combat racism, racial discrimination, xenophobia and related intolerance are considered priority tasks for each state.[4]. The obligation to provide protection against

[4] Decision of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance passed on 20 August 1993

these ills are contained in both general human rights agreements (the International Covenants on Civil and Political Rights and on Social, Economic and Cultural Rights from 1966; the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter), as well as a huge number of special accords (the International Convention on the Elimination of All Forms of Racial Discrimination, some International Labour Organization conventions, the European Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Languages and others). The European Union places great emphasis on this and since 2002 has demanded that all prospective EU members introduce in domestic legislation and practice the standards set out in EU Directive 2000/43/EU on adhering to the principle «equal treatment of all regardless of their racial or ethnic origin».

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that the «enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status».

Since Ukraine is party to the Convention, the judgments issued by the European Court of Human Rights on Article 14 must be taken into consideration in Ukrainian legislation and practice. It should be pointed out that Protocol No. 12 to the Convention prohibits any kind of discrimination at all.

All of this suggests the need for substantial amendments to Ukrainian legislation and practice which at present fail to meet the requirements of international agreements. For example, the basic constitutional norm of article 24 of the Constitution on equality before the law and the prohibition of discrimination (we would note that the actual word «discrimination» is not used either in the Constitution or in legislation) does not apply to those who are in Ukraine on legal grounds but are not Ukrainian nationals. The concept «indigenous peoples», mentioned in Article 11 of the Constitution is nowhere developed in legislation and has thus remained undefined.

The principle of equality before the law is reflected in a general way in the laws of different fields, and norms of civil and administrative legislation. However these normative legal acts do not contain anti-discrimination norms preventing discrimination in different areas of public life such as employment, education, health care, provision of accommodation, access to public and social services, contractual relations between individuals, between individuals and legal entities, and so forth These norms are needed also to introduce effective legal mechanisms and obligations of public bodies to protect against discrimination and to provide compensation for damages sustained.

For example, the Civil Code does not have the concept of discrimination at all. The Civil Procedure Code declares that cases shall be examined on the basis of equality before the law regardless of race, national identity, religion, education or language (Article 6). Article 248 of the Code of Administrative Offences speaks of consideration of cases being on the basis of equality before the law regardless of race, colour, political or religious convictions or ethnic origin. Article 7 of the Family Codes stipulates that members of a family cannot have privileges or face restrictions on the basis of race, colour, gender, political or religious convictions, ethnic origin, language or others factors. The same general norms are included in the Labour Code (Article 2-1); the Law «On education» (Article 3); the Law «On general secondary education» (Article 6); the Law «On pre-school education» (Article 9) and other laws. These norms, however, are not developed and remain mere declarations. For example, the Law «On remuneration» does not contain any norm regarding equality before the law. No normative act defines and differentiates between direct and indirect discrimination. Nor do declarations about equality before the law in fact prevent discrimination in practice. The following can serve as examples.

Pursuant to Article 3 of the Law «On education», Ukrainian citizens have the right to free education regardless of gender, race, skin colour, nationality, social and material position, convictions, religion or other factors. On the other hand, the admission rules of the Yaroslav Mudry [the Wise] National Law Academy envisage considerable restrictions for people wishing to receive a legal education. Education in the faculties preparing specialists for the prosecutor's office, the Security Service [SBU], the military justice system, the Ministry of Justice, penal institutions, the Pension

Fund, as well as the criminal investigation faculty is undertaken according to agreements between the Academy and those particular bodies (Item 3 of the Admission Rules). The agreements envisage written referrals of students from these bodies to the Academy. This effectively means that a student has to work in the relevant structure and it would be different to expect that the law enforcement agencies will be renewed, quite the contrary, they are likely to become more conservative. In our view, the Rules introduce direct discrimination and violate Article 3 of the Law «On education».

The Law «On national minorities» needs amendments, and there are, in fact, some draft laws designed at adding such amendments. The definition of national minorities as groups «of Ukrainian citizens who are not Ukrainian by nationality but share a sense of national identity and affinity» (Article 3 of the present law) is inadequate, and this failing is not unfortunately overcome in any of the draft laws. In the first place, «Ukrainians by nationality» are placed in ethnic opposition to those who «feel a sense of national identity». Secondly, the present contradiction with the content of Article 11 on the right to freely choose ones nationality is retained. In the definition of national minorities, it would be better to stress the subjective, rather than the objective character of a person's identification of him or herself as member of a specific national minority. It would be desirable to formulate the definition of national minorities as groups of Ukrainian citizens who do not see themselves as being ethnic Ukrainians and evince another ethnic identification and affinity among themselves. It would be wise to also strengthen the guarantees of freedom of choice of nationality with the norm: «The State does not interfere in the issue of ethnic identification of Ukrainian citizens».

One of the shortcomings of the current law is the lack of conceptual underpinning with regard to protecting the rights of national minorities. We have in mind the lack of right to exist and the lack of definition of national and cultural autonomy through which the identity of the minority is affirmed. There is also no procedure for creating such autonomy. Yet it is national and cultural autonomy in its various forms which will promote the exercising of the rights of national minorities. It is worth mentioning the norms of the former draft law of this Law which were excluded back in 1992. These were on creating a national administrative – territorial unit and on the competence of Councils of National Deputies for ensuring that national minorities participate in governance of governmental and civic matters, free use of ones national language, the creation of conditions for the development of national culture, traditions and everyday life, and that national pre-school and educational institutions are created, etc.

Article 18 of the present law indirectly prohibits direct and indirect discrimination on grounds of nationality, yet there is once again no definition of what constitutes direct or indirect discrimination. This needs to be rectified, and the range of types of discrimination which are clearly prohibited must be expanded to cover discrimination on the grounds of race, colour of skin, language and religion. The law's force should also be extended to apply to non-nationals. Another change needed is legislative resolution of the issue of electoral representation of national minorities, probably through the use of quotas or minimum numbers of representatives for particular groups. This could be added to the Law «On national minorities» or through the relevant provisions in electoral legislation. It would, we believe, be desirable to pass a new electoral law for the Crimea which takes into account the complex inter-ethnic relations in this region of the country.

The lack of clear and precise classification of certain behaviour as discrimination leads to impunity with discrimination virtually going unpunished in Ukraine, this leading in turn to further discrimination. The overwhelming majority of normative legal acts contain the same fixed phase «Persons guilty of infringing legislation bear civil, administrative or criminal liability in accordance with Ukrainian legislation». Yet neither civil liability nor administrative liability for discrimination is anywhere defined. With regard to criminal liability, this is applied only to individuals. If administrative liability is introduced, this will also apply exclusively to individuals. This means that members of minorities are virtually not protected from discrimination by legal entities.

Criminal legislation only touches on discrimination in Article 161 of the Criminal Code which punishes for deliberate actions aimed at inciting ethnic, racial or religious enmity and hatred, at denigrating a person's ethnic honour and dignity or causing offence with regard to religious beliefs. This article needs to be amended. It firstly needs to be extended to cover all individuals, not only Ukrainian nationals. Secondly, defence of honour and dignity must include additional grounds as

well as nationality and religion, for example, race, colour of skin, ethnic origin and language. Furthermore, Article 161 needs to clearly define acts of a racist or xenophobic nature as crimes.

The main reason why Article 161 is virtually not applied is the need to prove intent. Over recent years not one criminal prosecution under Article 161 has resulted in a court conviction. As the well-known specialist in this category of court cases and bar lawyer Viacheslav Yakubenko[5]:explains:

«*From time to time, in cases which receive a lot of public attention, criminal investigations are initiated under this Article, mainly where there is pressure placed, either from the public or from National Deputies. However it is virtually impossible to get anybody actually convicted of this crime. At the subjective level, the crime involves direct intent, with the particular aim of inciting ethnic enmity in the country or in a specific region, of denigrating the honour and dignity of representatives of particular ethnic groups. What this means is that in court the author of the provocative article must state that he or she intended to incite ethnic enmity. Furthermore, as a general rule, admission of guilt by the accused cannot be the sole proof in a criminal case. That is, there needs to be something added, for example, a note in the accused person's own handwriting with content like: «Chief, your task has been carried out, and a massacre provoked in the «Cotton Club». It is thus clear that the criminal case option has no chance of success*».

The wording of Article 161 needs therefore to be changed so that it can begin to work properly.

The range of criminally liable offences must also be extended. According to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination offences punishable by law include «all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof». Article 20 of the International Convention on Civil and Political Rights states that: «any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.» Thus to ensure that Ukrainian legislation complies with its international commitments, the relevant elements of the crime must be added to the Criminal Code.

One of the mechanisms which international institutions recommend is the creation of a special anti-discrimination government body. This demand is contained in Directive 2000/43/EU, in the Action Plan for implementing the Declaration on the Liquidation of All Forms of Racial Discrimination passed by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, documents of the European Commission against Racism and Intolerance, etc. Summarizing the demands of various institutions, a special anti-discrimination structure should carry out the following functions:

- consider allegations of discrimination; carry out independent investigations into cases of discrimination in various areas of public life;
- help victims of discrimination by providing consultations, access to justice, help in lodging civil suits and representation in the court;
- prepare and submit draft laws aimed at protecting against and preventing discrimination;
- carry out monitoring of legislation and practice, judicial and administrative in the context of countering xenophobia and discrimination;
- prepare and publish independent reports on issues related to combating discrimination and the implementation of special measures aimed at preventing discrimination;
- inform the public and public authorities about anti-discrimination practice existing in the world;
- encourage nongovernmental organizations to become involved in countering discrimination and inequality.

We believe that such a structure in Ukraine should be provided by a special Ombudsperson on Minority Rights who would head the relevant department within the Secretariat of the Human Rights Ombudsperson. However in order to achieve this, the Law on the Human Rights Ombudsperson needs to be changed.

[5] http://www.khpg.org.ua/en/index.php?id=1127287663&w=Yakubenko

To sum up, it would be desirable to prepare and pass a base anti-discrimination law containing all the necessary definitions, a list of grounds where discrimination is prohibited and a mechanism to protect people against them, increasing the responsibility of the government for countering discrimination and introducing a special anti-corruption body.

3. XENOPHOBIA IN UKRAINE

In our opinion, the level of xenophobia in Ukraine remains relatively low and is no higher than in other post-totalitarian countries. It is in fact lower than in Bulgaria, Romania, Poland, Hungary, the Czech Republic, Slovakia and the Baltic States. It is considerably lower than in Russia.

It must however be noted that there has been a rise in xenophobic incidents aimed at immigrants from the Caucasus, Asia and Africa, the Roma, Crimean Tatars, Russians and Jews. These incidents have sometimes involved violence, bodily injury or even death. We have witnessed acts of vandalism against Ukrainian, Russian, Crimean Tatar and Jewish sacred places and symbols; and sometimes against those other national minorities and ethnic groups. We can cite the following examples from January to April 2007.[6]

1. 27 April 2007 – desecration of a Monument in Khmelnytsky marking the graves of eight thousand Jews murdered by the Nazis during the Second World War. The memorial plaque was removed and smashed.

2. 22 April 2007 – in Kyiv a swastika was daubed over the temporary Armenian Chapel on Podil and its lock damaged. The police call this a conflict between local residents who don't want a church built on the square and the Armenian community. A similar attack took place in 2005 on an Armenian Cathedral in Lviv.

3. 12 April 2007 – around seventy gravestones were vandalized and three destroyed at the old Jewish Cemetery in Chernivtsi

4. During the early hours of 18 February 2007 in three districts of Odessa several hundred graves at the Jewish Cemetery were desecrated, as well as two Monuments to the Victims of the Holocaust and a memorial plaque on the home of a Jewish writer. Swastikas were daubed, as well as an offensive message about the Holocaust. At the beginning of March, the police informed that three suspects had been detained under Article 297 of the Criminal Code «Vandalism». Yet observers believe that actions on such a major scale requirement several groups of a few dozen people.

5. 17 February 2007 – in Kyiv over forty gravestones at the Lukyanvisky Military Cemetery were damaged or smashed, and the plaque on the Menora Monument at Babi Yar was smashed. On 20 February two suspects were detained who, according to press reports, confessed to committing the acts for anti-Semitic reasons. Since there were no crosses on the graves at the Military Cemetery, they had decided the people buried there were Jewish.

6. 9 January 2007 – in Kharkiv, on a building which was once a synagogue, the memorial plaque to Victims of the Holocaust was smashed and two swastikas painted.

We believe that the reaction of the authorities to these xenophobic incidents was not adequate and that there is a need to develop and implement special measures aimed at preventing such xenophobic behaviour. These measures need to be drawn up bearing in mind specific local and regional features. Both the government and the public need to adopt a much more active and uncompromising position with regard to those who incite enmity.

In the following section, we consider the specific features of xenophobia with regard to particular ethnic and social groups – the Roma, immigrants from Africa, Asia and the Caucuses, and Jews. We do not give special attention to the position of the Crimean Tatars since that was discussed in depth in *Human Rights in Ukraine – 2004* and there have been no significant changes since then.

[6] The examples are from an article by Maxim Butkevych: «Initiative «Without borders»: Demonstrations of Xenophobia and Racism in Ukraine». Available at:
http://www.khpg.org.ua/index.php?id=1179241286&w=%C1%F3%F2%EA%E5%E2%E8%F7

THE ROMA PEOPLE

According to the 1989 census, the number of Roma people comprised 47,900, with 12,131 living in the Transcarpathian region. However, the findings of special research carried out by the Uzhhorod Regional Council suggest that the number of Roma people in the Transcarpathian region is in excess of 20,000, that is, 1.6% of the population of the region. The results of the 2001 census were as follows: 47 600 indicated their Romany ethnic origin, 14,000 of whom lived in the Transcarpathian region. The next largest group is in the Odessa region where, according to the census of December 2001, there are more than 4,000 Roma people According to data from the civic organization «The Romany Yag», the number of Roma people in the Transcarpathian region is around 50,000, and throughout the country – from 200 to 300 thousand. According to the Head of Romany Yag, Adam Aladar, the main reason for the divergence between the results of the census and the real number of Roma people is that people do not want to identify themselves as Roma because they will then have far more difficulty finding work and will experience problems from public officials and law enforcement officers.

Attitudes within society to the Roma remain negative, and sociological surveys suggest that prejudice against the Roma is more widespread than against people from other national minorities. Studies into national tolerance applying the Bogardus scale[7], which have been carried out every year since 1994 by the Institute of Sociology, show that the level of intolerance has throughout these years registered more than 5 on this scale and has been gradually increasing. The results suggest that in the mass perception, the Roma are not considered permanent residents of Ukraine

The Roma experience the highest degree of intolerance and suffer greatly from social discrimination. The level of unemployment among the Roma is, on average, the highest, their living conditions are worse than those of other ethnic groups. They experience more difficulty with access to education, medical services and the judicial system. School attendance figures for Roma children remain low. According to Roma rights organizations, the greatest number of complaints they receive relate to allegations of arbitrary treatment from the law enforcement agencies. Most Roma people have little education, or have never studied anywhere. They are extremely intimidated and frightened to complain. Therefore, feeling total impunity, law enforcement officers force them to admit to unsolved crimes. In areas with a large number of Roma, the police use their own specific «prophylactic form of fighting crime». Early in the morning, a group of police officers arrives at the Roma camp, shoves all the men into a bus and takes them to the department of the Ministry of Internal Affairs. They're held there for 3-4 hours, then they take fingerprints and with no explanations release them. Civic organizations are demanding that an end be put to this behaviour which is illegal, yet takes place regularly. The following letter was sent to various government bodies by the Head of the Uzhhorod organization Romany Yag and the Head of the All-Ukrainian Roma Rights Association «Chachipe» Adam Aladar.

To the Minister of Internal Affairs Y. Lutsenko
Copies to:
The European Roman Rights Centre (Budapest)
The Human Rights Ombudsperson N. Karpachova
The Verkhovna Rada Profile Committee H. Udovenko
The Head of the Transcarpathian Regional MIA Department I. Rakhivsky

Dear …,

On behalf of the Uzhhorod Roma community I am for the second time this year compelled to approach you asking why there is continuing violence directed against the Roma people.

In the morning of 21.01.2005 some Roma people came to our office. They said that the day before, on 20 January, around 6 o'clock in the morning, police officers in masks burst in to some Roma flats on Pohranichna, Telman and Hranitna St. They used brute force and without any explanation forced the people there to get into a bus and go with

[7] Emory S. Bogardus. «Measuring Social Distances». *Journal of Applied Sociology* (1925)

them to the Uzhhorod Police Station. When asked to explain what was going on, some police officers began inflicting blows on the Roman. As a result of this unlawful behaviour, some of the Roma sustained bodily injuries, and clothing and household items were also damaged.

On arrival at the Uzhhorod Police Station, the Roma had their fingerprints taken, were videoed and photographed. During this procedure no explanations were given nor any documents for them to sign.

According to the Law «On the Police», the police are allowed «to take photographs, audio recordings, film and video recordings or take fingerprints of people, however only of those who:

- *have been detained on suspicion of having committed a crime, or for vagrancy;*
- *are accused of a crime;*
- *have been remanded in custody;*
- *have been placed under administrative arrest.*

There are thus only four grounds for taking fingerprints. Furthermore, each has its own procedural formalities (the decision of an investigator, a protocol, etc). The same grounds are set out in Item 1.5 of the Instructions «On the procedure for the functioning of the fingerprint register of the MIA Expert Service», passed by MIA Order on 11.03.2001. Yet not one of the Roma had been «detained on suspicion of having committed a crime», «remanded in custody» or «accused of a crime». The police behaviour with regard to the Roma minority was therefore unlawful and no «operational requirements» can justify it.

Similar instances took place in the morning of 29 September this year when police used brute force against 36 Roma people from Telman St. in Uzzhorod. They got them up at 6 in the morning and took them in a police vehicle to a city police station. It is also disturbing that the police demanded from 10 to 15 UAH from each Roma as payment for petrol. Those Roma who had money on them paid it directly to the police station, otherwise the camp head paid for them.

A similar flagrant case was seen in the early hours of 20 October this year in the village of Velyka Dobron in the Uzhhorod district when 3 police officers beat Roma from that camp. We have received statements from the latter in defence of their honour and dignity.

The last of such cases took place during the early hours of 26 October this year and was once again directed against Roma people from the Radanka and Pirogov St micro–districts. Armed officers from Internal Affairs agencies burst into Roma flats, dragged the people up and pushing them with their rifles shoved them into cars which took them away and returned to collect more people.

We previously made a statement to the Head of the Transcarpathian Regional MIA Department Police Colonel I.I. Poro–shkovsky with regard to such treatment of the Roma of the Transcarpathian region being unacceptable. Material regarding incidents of abuses committed by law enforcement officers against Roma was published in the national bi–weekly news–paper «Romany Yag» from 27 January 2005 and 26 October 2005. A roundtable was also held, attended by the Deputy Head of the Transcarpathian Regional MIA Department Mykhailo Turyanyshch, the Head of the Transcarpathian Regional Criminal Investigation Department Volodymyr Shelepets and the Programme Coordinator for «Roma Rights in Ukraine and Access to Justice» Ishtvana Fenveshi from the European Roma Rights Centre (ERRC) in Budapest. The roundtable passed a resolution with proposals for improving the situation with Roma rights. Since then the management of the Department has changed several times, and after each new appointment, such «going over» in the camps has continued.

Given the above, I would strongly ask you to intervene urgently in this situation in order to prevent rights abuse with regard to citizens of Roma nationality, as well as to ascertain the reasons for so–called «going over» of Roma camps by police officers.

Yours sincerely,

Adam Aladar Head of the All–Ukrainian Roma Rights Association «Chachipe»

26.10.2005.

As a result of this letter a special session of the Verkhovna Rada Committee on Human Rights, National Minorities and Inter-ethnic Relations was held focusing on the situation with Roma rights. The Committee adopted recommendations for improving the situation and sent these to public authorities. Ministry of Internal Affairs representatives promised that the practice of mass compulsory fingerprint taking would be stopped. Unfortunately, however, such cases are still continuing to occur.

It is not only public officials and law enforcement officers who become implicated in discrimination against the Roma, but also many media outlets. The headlines and content of articles like «Gypsy brigade into dodgy business» or «Villagers in the Cherkasy region suffer from the carousals of Gipsy newcomers» are not subjected to criticism. Where a person suspected of having committed a crime is from the Roma minority, both the police and the media emphasize the link with «gypsies». An article, for example, in a Khmelnytsky newspaper[8] begins with the headline «Four gypsy woman swindlers detained in the Khmelnysky region». It opens with the statement that during 2007 115 cases of swindling had been registered with «a large percentage committed by gypsies», and then describes the crimes in detail, with «gypsies» presented as the perpetrators. Presumably the journalist did not feel that the presumption of innocence applied to certain minorities.

We could cite a number of examples of direct and indirect discrimination, as well as acts of coercion directed against Roma people. They are the most discriminated against ethnic group in the country. In our opinion, a government programme is needed to improve the situation and address issues linked with all aspects of Roma life, in particular education and health care to which the Roma people do not have normal access.

DISCRIMINATION AGAINST IMMIGRANTS FROM THE CAUCUSES, ASIA AND AFRICA

We believe that the status of these groups should be considered in the context of racial discrimination. Members of these groups cannot leave the place where they live without documents since they risk being detained by the police to ascertain their identity. The police often stop people with a darker skin and check their documents, while such checks on people of European origin are rare. Although police officers resorting to acts of coercion have faced disciplinary proceedings where these cases were brought to the attention of the management, such behaviour remains common. Members of these ethnic groups are the first to be suspected where a crime has been committed, and the police and penal institution personnel are more brutal towards them. The research mentioned above by the Institute of Sociology of the Academy of Sciences during the 1990s found that the level of intolerance in the country exceeded 5 on the Bogardus Scale. This would suggest that these groups are also not seen as being permanent members of Ukrainian society.

It should be noted that in some circumstances law enforcement personnel collect information about whether a person belongs to a specific ethnic or immigrant group. They gather, for example, operational data regarding crimes committed by certain minorities. This data contains detailed statistics regarding criminal cases involving Crimean Tatars, Roma, and immigrants from the Caucuses, Asia and Africa in different regions of the country. This activity has no legal justification and is not based on voluntary identification. The gathering of personal data regarding whether a person belongs to certain national minorities without their consent and in the absence of legal guarantees is a flagrant violation of the right to privacy which is guaranteed by both the Constitution and international standards.

There has been an increase in the number of media reports of racially motivated violence against people of Asian or African origin, or from the Caucuses. At the same time law enforcement agencies have constantly ignored likely racial motives and classified them as ordinary hooliganism. The following are typical.[9]

[8] http://20minut.ua/news/61594

[9] The examples are from an article by Maxim Butkevych: «Initiative «Without borders»: Demonstrations of Xenophobia and Racism in Ukraine». Available at: http://www.khpg.org.ua/index.php?id=1179241286&w=%C1%F3%F2%EA%E5%E2%E8%F7

1. On 14 March (according to other information – 14 April 2007) in the centre of Kyiv, a group of young people attacked an adviser to the Egyptian Embassy in Kyiv, Khalepa Nader, and inflicted injuries. The embassy confirmed this information, as well as the fact that an official note of protest had been sent to the Ukrainian Ministry of Internal Affairs. The Ministry of Foreign Affairs and the MIA denied knowing anything about this. International press agencies spoke of the assailants as «neo–Nazis».

2. On16 February 2007 in Kyiv, according to the newspaper «Komersant – Ukraine», a Georgian national Moris Yugashvili was murdered. According to the press report, the dead man's brother said that Mr Yugashvili had been set upon by assailants who looked like skinheads. The police however say that the death was the result of an everyday dispute.

3. Around 3 February 2007, in Simferopol, a female medical student from India was attacked and lost consciousness as a result of her beating. The incident was mentioned in an article from the Crimean press as just one of the many attacks on foreign students.

4. During the evening of 12 January 2007, on Kyiv's Khreschatyk St, a group of around 20 young people attacked three Iranians, at least one of whom was a student of the Glier Kyiv State Higher Music School. Chanting national and racist slogans, they inflicted bodily injuries. At least one of the victims had to be treated in hospital.

5. On 2 December 2006 on Sophia Square in Kyiv, members of the UMAII [the «Ukrainian Movement against Illegal Immigration»] held a rally calling for the release of one of their number who had been detained on suspicion of involvement in the murder in Kyiv of a Nigerian national on 25 October, as well as against the presence in Ukraine of migrants from other countries. A day earlier, members of the same organization had handed out leaflets inciting racial enmity outside the UNIAN press agency where a press conference was being given by members of the Nigerian community.

6. On 25 October 2006, near the metro station «Poznyaky» in Kyiv, a Nigerian Hodnoys Myevi was fatally stabbed. The assailants, according to witnesses, chanted racist slogans. The Kyiv Prosecutor's Office has charged one of those detained under Article 115 (Murder), while two others have been charged under Article 161 which has been applied for the first time in a case involving murder. As of the end of May 2007 the trial had not yet begun.

7. In Kyiv, on 26 February 2005, a group of neo–Nazi skinheads attacked Robert Simmons, an Afro–American employee of the US Embassy. His white companion was not touched. The US Embassy registered an official protest.

The author of this section personally investigated the complaints made by foreign students in Kharkiv. They spoke of insults, threats and being beaten up and said that they felt under real psychological pressure, and were too afraid to go outside in the evenings. The protest actions which they describe – marches by skinheads at the weekends around hostels in Kharkiv where foreign students live; marches in the late evening with candles and torches, supposedly by students aggrieved that foreign students received better treatment, chanting «Ukraine for Ukrainians» and other aggressive slogans, with these marches ending in all «non-Russians» they can find being beaten up) bear the hallmarks of actions inspired from outside. It is characteristic that these slogans are chanted in Russian. One has the impression that they have been specially organized and paid for. It is difficult to imagine that Kharkiv students would voluntarily gather in the late evenings at weekends for such marches.

JEWS

According to the census of 1989, there were 486 300 Jews in Ukraine. During the 90s, this figure decreased significantly; according to the last census, there are now 103 591.

Traditional everyday anti-Semitism exists in Ukraine, as in many other countries, but its manifestations, in our opinion, are not as menacing, as some Jewish organizations assert. Jewish people are widely represented among the political, business and cultural elite. Of all national minorities in Ukraine, they have perhaps best succeeded in using the new opportunities which have presented themselves in today's Ukraine. There are a large number of Jewish educational and cultural institutions, schools, theatres, publications, etc. There are therefore no grounds for talking of discrimination against Jews. At the same time, the number of reports of anti-Semitic behaviour in 2005 and 2006 rose significantly, accompanied by a serious increase in the number of anti-Semitic publica-

tions in the press. This is reflected by monitoring carried out by the Congress of National Communities of Ukraine[10]. The increase in anti-Semitism can be clearly seen by comparing the number of anti-Semitic publications over 10 years, beginning in 1997 which saw the lowest number in all the years of independence.

The number of anti-Semitic publications from 1997–2006

1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
143	265	250	161	161	149	258	379	661	676

The table shows that the number of anti-Semitic publications has risen over the last 10 years by more than 4.5 times.

An analysis of periodical publications which print material of an anti-Semitic nature shows that the increase in the number of publications can be attributed to publications which are owned or sponsored by the Inter-regional Academy for Personnel Management [MAUP]. These are the journal «Personnel»; the newspapers «Personnel Plus», «For a Free Ukraine Plus», «Ukrainian Newspaper Plus» and «Information Bulletin». This is graphically demonstrated by a breakdown of anti-Semitic publications for 2006.

Publication	**Number of issues in the year**	**Number of anti-Semitic publications in the year**
«Personnel Plus»	52	335
«Personnel»	12	47
«For a Free Ukraine Plus»	52	184
«Ukrainian Newspaper Plus»	47	82
«Information Bulletin»	46	20
Others		8
Total 676		

A large amount of material in MAUP-controlled publications is full of aggressive and xenophobic sentiments towards Jews, Russians, migrants both from immediate neighbours and other countries. One can gauge the aggressive nature simply by looking at the titles of articles (taken from the newspaper «Personnel Plus»): «Against the doctrine of Jewish racism»; «Ritual killing by order of the children of Zion»; «Victory of democrats is a victory of sexual minorities and Jews»; «The Chosen People against Ukrainians», and so forth.

MAUP periodic issues are published with large print runs. The newspaper «Personnel Plus» is in the first ten newspapers in Ukraine in terms of the size of its print run. A part of this is distributed free of charge among students of MAUP branches. At present, in addition to the publications already listed, MAUP puts out and distributes the journal «Book Club», the newspapers «Ukrainian leader» and «For a Ukrainian Ukraine». In 2007 these were included in the Catalogue of Periodical Publications and will be distributed by post around the entire country. MAUP also publishes a considerable number of books and brochures of an anti-Semitic nature, with a whole network of bookshops created for disseminating these.

We thus see in Ukraine that instead of separate and as a rule marginal newspapers with small print runs publishing anti-Semitic articles, a powerful propaganda centre has emerged which is promoting in a consistent and deliberate manner anti-Semitism. There is a whole circle of propa-

[10] Viacheslav Likhachov: Anti-Semitic actions and material in periodical publications in Ukraine for 2006

gandists of anti-Semitism around MAUP; links are created with foreign anti-Semitic publications and there is active exchange of material on anti-Semitic subjects. MAUP is actively engaged in international activities aimed at creating and maintaining the reputation of being one of the world centres for fighting Zionism. Each year MAUP hosts international «academic conferences», symposia, forums with an anti-Semitic and anti-Zionist bent. On 24 November 2006, for example, it held an «International Forum of Holodomor [the Famine of 1932-1933] in Ukraine: Punitive bodies of the Jewish-Bolshevik regime». On 3 June there was a conference «Dialogue of civilizations: Zionism – the greatest threat for contemporary civilization». The following is a typical excerpt from the latter event. «Zionists have always complained that they're oppressed. But I personally have never heard an answer as to why Hitler killed them (applause). All Jews should move to their Jewish [the word used is offensive in Ukrainian – translator] country Israel!» (enthusiastic applause).

The anti-Semitism of MAUP's leaders came pouring out during the 2006 parliamentary elections in which the Ukrainian Conservative Party [UCP] took part. This party was headed by MAUP rector Georgy Shchokin. Up until the emergence of UCP, anti-Semitism was a secondary factor in Ukrainian politics, which was observed among marginal extreme right-wing political groups. UCP openly and assertively declared itself as an unyielding fighter on principle against Zionism, a Jewish State, Jewish organizations and Jews in general. It received, however, minimal support from Ukrainians, gaining a mere 0.09% of the votes.

The increase in propaganda of anti-Semitism has contributed to a rise in anti-Semitic actions. In 2006 the Committee of National Communities of Ukraine registered 5 cases of violence against Jews and16 acts of vandalism. The following are some examples.

1. On 16 December 2006 on Podil in Kyiv, near the Synagogue, around ten young men, chanting anti–Semitic slogans, assaulted three Jewish believers in traditional clothes. Two of the believers managed to escape, however the third was beaten up, as was a passer–by who attempted to stop the attack.

2. On 23 June 2006 in Kirovohrad a local synagogue was pelted with stones. According to members of the Jewish community, this was the fifth such attack since the beginning of the year.

3. On 20 April 2006 in Dnipropetrovsk a young Jewish worshipper Kham Hobriv was set upon by a group of young people as he left the Synagogue. He received knife wounds and a serious head injury. A few days before this, four Jewish teenagers had been attacked on the central square in Dnipropetrovsk by a group of neo–Nazis.

4. On 11 September 2005 in Kyiv, on the grounds of the National «Expo–Centre Ukraine», several adolescents assaulted two Israeli nationals, father – Rabbi Mikhael Menis and his son Mordechai. The police detained the assailants and charged two with «hooliganism».

5. On 28 August 2005 in Kyiv, two students from a Jewish educational institution were attacked by a group of neo–Nazi skinheads who brutally beat up their victims, chanting anti–Semitic slogans. One of the victims, Mordechai Molozhenov, was beaten into a coma. Three of those detained were charged with «hooliganism».

The authorities have on many occasions demonstrated their negative attitude towards MAUP, however in practice very little has been done to deal with it. It is worth mentioning that the sharply negative attitude shown by President Yushchenko to Jew-phobia and its manifestations has undoubtedly had an impact on some national – patriotic political forces which have stopped their anti-Semitic rhetoric and publications. However on the whole the Ukrainian authorities have proved helpless in their efforts to stop anti-Semitic utterances in MAUP publications. A number of court suits filed by Jewish organizations over overtly defamatory statements by authors in MAUP newspapers against Jews have ended in the termination of the case for want of the elements of the crime. At the same time MAUP counters with civil suits against Jewish organizations and public authorities and sometimes wins. The latest lawsuit brought by MAUP at the end of 2006 was against President Yushchenko's Press Service as individuals for «insulting, defamatory and untruthful information about MAUP intolerance towards Jews».

In its attitude to anti-Semites the authorities are inconsistent. On the one hand, on the eve of Jewish holy days and anniversaries, statements are made condemning anti-Semitism. On the

other – on key dates for anti-Semites, they are awarded State honours. For example, the Head of the Editorial Council of the newspaper «Silski visti» [«Rural news»] Ivan Spodarenko, who has repeatedly published anti-Semitic articles in his newspaper, was honoured with the title of Hero of Ukraine. Another notorious anti-Semite Vasyl Yaremenko received a prestigious literary award, and the Vice-President of MAUP for publishing Yury Bondar was honoured «For his contribution to the development of the information sphere».

Such actions by the authorities render meaningless all attempts by the public to fight xenophobia and anti-Semitism, demonstrating, regardless of their declarations, a tolerant attitude to manifestations of these evils based on motives of political expediency.

One can say in general that the Ukrainian authorities are not able to firmly react against anti-Semites with this resulting in even more determined propaganda of anti-Semitism.

4. THE LANGUAGE ISSUE: THE UKRAINIAN AND RUSSIAN LANGUAGES IN UKRAINE

The legal framework regulating the co-existence of different languages, the use of languages in education, science and other spheres of public life, is the point at which ethnic and language-related problems and contradictions meet. The most heated discussions and political speculations arise specifically around language issues. Well-planned State policy in resolving these issues is the guarantee for avoiding discrimination and conflict. This is why it is so important to analyze the problems, taking into consideration specific regional and local features.

It is important to remember that in Ukraine linguistic and ethnic groups do not coincide. For a large percentage of ethnic Ukrainians, Russian is their native language. Some of them do not feel or consider themselves to be Ukrainians. A survey by the International Institute of Sociology showed that only 58.8% of the 72.6% who are ethnic Ukrainians think of themselves as Ukrainians, whereas 10.8% of ethnic Russians (20.1% of the whole population) consider themselves to be Ukrainians. Thus, every fifth Ukrainian and every second Russian see themselves as having dual nationality. 41.6% named Ukrainian as their native language. Russian is the native tongue of 43.4%. The others replied that they were bilingual.

The same picture is given by the national census results from December 2001. 85.2% of ethnic Ukrainians said that their native language was Ukraine, and 14.9% – Russian. 95.9%, 0.2% – another language.

We believe that these statistics are convincing evidence that the exchange of information is carried out in two languages – Ukrainian and Russian. It is desirable to support both languages, while at the same time introducing special measures for supporting Ukrainian as the State language.

Allegations of language discrimination are fairly frequent, with both Ukrainian and Russian being presented as the language discriminated against. With regard to discrimination against the Ukrainian language, this is mainly in the Crimea and some eastern regions of the country where Ukrainians have the sense of being an ethnic minority. In our view, counterclaims of discrimination against Russian-speakers are the result of harmful administrative practice inherited from the Soviet administrative system where, for example, officials forcibly introduce higher education in Ukrainian despite a lack of lecturers able to teach in Ukrainian, of textbooks and of students who wish to study in Ukrainian. Nonetheless, they take a decision according to which teachers may only receive the highest qualification categories if they speak Ukrainian. The requirement to hold entrance exams to universities and institutes exclusively in Ukrainian also seems to us inadequate, since many of those applying do not know Ukrainian sufficiently well. In this way, they find themselves at a disadvantage to Ukrainian-speaking applicants. An opposite, yet similar, situation was seen in Soviet times when young people from Ukrainian villages could not get into higher education institutes because they did not know Russian well. This leads to fears regarding enforced «Ukrainianization» are fuelled by the impatient moves of Ukrainian-speaking Ukrainians and the incompetence of executive bodies. However, this «enforced Ukrainianization» is fairly often used by certain political groups for campaigning aimed at returning Ukraine to a new empire. These two phenomena should not be confused.

Knowledge of Ukrainian is compulsory for civil servants. Any persecution for using the Ukrainian language or for campaigning to change over entirely to this language is not to be tolerated. One must ensure at the same time that no persecution is allowed for using the Russian language. Any forcible restriction of information flow in Russian must be prohibited, as well as any discrimination when employing people on the grounds of ethnic origin.

At the same time, we cannot support demands to declare Russian a State language of Ukraine. This demand only appears democratic. It is quite possible to grant several languages State language status provided that the starting conditions are equal. Bearing in mind, however, that, as the consequence of prolonged Russification, the Russian and Ukrainian languages are not starting out equal, applying the principle of free competition here would inevitably lead to a strengthening of the position of the Russian language. Furthermore, making Russian a State language would «set in stone» the spheres of influence of each language. In conditions where people behave according to totalitarian stereotypes, this division could lead to the languages being opposed, and establish great barriers between the territories where they are used, and thus create a basis for the disintegration of the Ukrainian state.

We reject the division of languages into «of future significance» and «of no future significance» regarding each language as an invaluable creation of humanity. For this reason State protection for the historically weaker Ukrainian language is not only justified, but also necessary. It is also vital to support the free functioning of other languages which suffered from the pressure of Russification.

State policy regarding languages must, therefore, avoid extremes. On the one hand, the State should not give encouragement to citizens who do not recognize the need to study Ukrainian and who declare that any step in this direction is enforced Ukrainianization. On the other hand, it would be inadmissible to ignore the wishes of Russian-speaking citizens of Ukraine or to use coercive measures to force the use of the Ukrainian language. It is necessary to ensure the gradual inculcation of the Ukrainian language in all spheres of our life, taking into consideration the inertia of language processes.

5. DISCRIMINATION AGAINST SEXUAL MINORITIES

According to the leaders of some nongovernmental organizations for sexual minorities – «Liga», «Our world», «Gay Alliance» and others, there are about a million gays and lesbians in Ukraine, and several thousand homosexual families.[11] The community of Lesbians, Gays, Bisexuals and Transgender (LGBT) say that they experience discrimination in all spheres of social life.

According to surveys regarding discrimination carried out by the company TNS-Ukraine in January and February 2005, 14.4% mentioned sexual orientation as a potential cause of discrimination. The same percentage of respondents pointed to gender as one of the possible reasons for being discriminated against. Among younger respondents (up to 35), 21% spoke of incidents of discrimination on the basis of sexual orientation. Taking into consideration the number of members of the LGBT community, this figure seems quite serious and suggests widespread discrimination against sexual minorities.

From January to March 2005, the regional information and human rights centre for gays and lesbians «Our World» carried out a study entitled «Discrimination against Ukrainian citizens on the basis of sexual orientation»., as part of the project «Monitoring, representing the interests and defending the rights of the LGBT community»[12]. The study constituted a survey of people of homosexual orientation, with no other demographic indicators taken into account. 330 questionnaires were received back by post with another 575 respondents giving their answers during interviews. The study was able to cover various groups of LGBT differing by gender, age, region, place of residence and social status. 901 questionnaires were chosen for analysis).

Discrimination on the basis of sexual orientation is specific in that it depends directly on whether or not a person conceals their orientation. On the question of whether they were open

[11] http://www.gay.org.ua/articles/letter.htm

[12] Discrimination on the grounds of love. Report on observance of gay and lesbian rights in Ukraine – Kyiv: Nora Press, 2005..

about their sexual orientation, 4% said that they concealed it from all; 38.2% said that only a few bisexual or homosexual friends knew; 27.8% answered that only their family and close friends knew; only 29.3% said that they did not hide their orientation from anyway, or that a wide range of people knew. There was a direct link between a person's openness and demonstrations of discrimination towards them. Among those who didn't conceal their sexual orientation, 76.3% said that they had experienced discrimination in some aspect of their life. This rate gradually decreases according to the person's level of openness (56.7% of those whose orientation was known only to close friends and some relatives; 37.8% where only a narrow circle of people themselves homosexual were aware of the person's orientation; reaching 13% for those who told nobody about their sexual orientation). The study found that women are more open than men, and at the same time experience much less discrimination. The level of openness decreased according to age, as did accordingly the number of people feeling discriminated against.

The study showed that the greatest level of discrimination experienced by members of the LGBT community is in the area of labour relations. The question regarding work was directed at those who had been working or looking for work over the last four years. 417 questionnaires fell into this category. 326 of the respondents (78.2%) said that they had encountered rights abuse and discrimination in the labour sphere. Of these 216 (51.8%) answered that the people they worked with knew about their sexual orientation. The most typical violations named were: obstructions to being promoted – 12.9%; a prejudice attitude towards them as compared with other employees – 21.1%. The more open people were about their sexual orientation, the more likely they were to encounter discrimination or other violations of their labour rights. 35% of those surveyed (of whom almost 80% were people whose orientation was known to others) said that they had experienced psychological pressure from colleagues. 19 people (including three women) stated that they had faced sexual harassment. Physical violence had been applied against 20 employees (including 4 women). 4 people said that they had been raped by other employees.

The second most common area of discrimination related to privacy and the right to information. 42.8% of all those surveyed had encountered some kind of infringement in this sphere. Almost a quarter (23.8%) indicated that information about their sexual orientation had been disclosed without their consent, and a further 18.7% had been threatened with disclosure of the information. 8.5% were not about to place information about a single-sex friendship, they were turned down. 28.1% stated that they found distorted and untruthful information in the media regarding people with non-traditional sexual orientation.

The largest number of cases of discrimination and prejudiced or negative treatment of people with non-traditional orientation had been at the level of inter-personal relations. 300 people (40% of those surveyed) spoke of psychological pressure, humiliation or insults. It is important to note that some of those respondents not concealing their orientation – 43.6% (with this group making up 29.3% of the total number of respondents), or 54 respondents (including 12 women) had experienced sexual harassment. 82 people (including 7 women) had faced physical violence, while 13 men and one woman had been subjected by private individuals to sexual coercion.

The results of the study showed that every second person of those whose rights had been infringed had attempted in some way or other to defend their rights (248 people). Half of the respondents had done nothing. When asked whether they had succeeded in upholding their rights, more than a third (35.9%) said that they had not been successful. More than a third (36.5%) stated that they had managed to uphold their rights, and by themselves, without approaching the relevant bodies or institutions. A further 8.1% were able to defend their rights thanks to making such approaches. The others had either partially resolved the problem of their violated rights, or had changed their circumstances by moving, running away from their family, or other ways.

The study also found that members of the LGBT community experienced a considerable number of rights infringements in the area of family relations and cohabitation. This was linked with the fact that the issue of single-sex cohabitation is not at all regulated by legislation. On the one hand, single-sex partners where they are living together have virtually the same range of rights in connection with this as other members of a family. This applies to joint property, inheritance, etc. On the other hand, in practice, one of the partners is deprived of the right to joint property or

to a part of it, inheritance rights, the right to jointly bring up the child of one of the partners, etc. The same applies to the right to adopt although Chapter 18 of the Family Code on adoption does not contain any restrictions with regard to the sexual orientation of the adoptive parent. Nor are there any such restrictions in Chapter 19 of the Family Code which regulates the legal relations with regard to guardianship or care. Yet 23 respondents (including 2 women) stated that they had been refused protection of their property rights as part of a homosexual couple. 16 respondents (all men) had had their applications for a joint loan together with their partners turned down. 10 respondents (all men) had not been allowed to adopt children. 8 respondents had had their right of inheritance turned down, and another two (both women) had not been able to take time off to look after the child of their partner. This means that they were deprived of the rights which heterosexual couples have.

Single-sex partnerships are legally excluded from social life making their participants totally vulnerable before the law. There are no real opportunities to represent one's partner's interests in property, financial, medical or other relations; there is no possibility to jointly adopt and bring up children, or nor to enjoy the relevant benefits and privileges, nor is there any mechanism for protection of property or other rights and interests of each of the partners should they separate. It is these issues, and not the recognition of single-sex marriages, that requires crucial legislative regulation and guarantees.

Nongovernmental organizations for sexual minorities approached the President, members of the Cabinet of Ministers, National Deputies and members of the All-Ukrainian Council of Churches and Religious Organizations with regard to resolving the problems of the LGBT community.[13]. They received answers from the Ministry of Foreign Affairs, the Ministry for Family, Youth and Sport, the Ministry of Justice and the Ministry of Employment and Social Policy. The responses demonstrate recognition of the problems and the will to resolve them.[14]. However the Head of the Verkhovna Rada Committee on Human Rights, National Minorities and Inter-ethnic Relations Leonid Grach reacted unexpectedly. Mr Grach stated that in the light of his position he needed to defend human rights. As he put it: «My colleagues and I in Parliament have to defend society from infringements upon morality and not allow the thought to enter the consciousness and souls of people of any age that the State is on the side of people spreading debauchery, propagandizing wantonness and sexual permissiveness and bringing the abomination of depravity into society. The State must protect society from evil, from violence, including such evil as homosexuality, lesbianism and the like.» Leonid Grach considers that Ukrainians should observe the norms of moral purity «bequeathed us from old times by Orthodox ancestors».[15]. A novel perception of human rights from the head of the parliamentary profile committee!

5. RECOMMENDATIONS

1. Draw up and pass a basic anti-discrimination law which should contain all necessary definitions, a list of prohibited grounds for discrimination, as well as mechanisms for protecting against such discrimination. It should also increase the State's responsibility for combating discrimination and introduce a special anti-discrimination body.

2. Prepare a Draft law on amendments to the Law «On national minorities in Ukraine», and undertake an expert analysis of the Draft to ensure its compliance with OSCE, Council of Europe and European Union standards.

3 Draw up a Draft law on amendments to the Law on languages and review the Law on ratification of the European Charter on regional languages and language minorities.

4. Prepare Draft laws «On national-cultural autonomy», on amendments to the Civil Code and other laws, as well as special programmes aimed at developing the principle of non-discrimination,

[13] http://www.gay.org.ua/articles/letter.htm
[14] http://www.gay.org.ua/articles/reply.htm See also http://www.khpg.org.ua/en/index.php?id=1174094707&w=Grach for more about the outrage expressed in reaction to Mr Grach's comments (translator)
[15] http://obozrevatel.com/news/2007/2/9/155653.htm

and allow special quotas for discriminated ethnic groups (the Roma, Crimean Tatars, Karaims, Krymchaks, etc.).

5. Prepare a special electoral law for the Autonomous Republic of the Crimea.

6. Carry out an inventory of land in the Crimea to help resolve the problem of land allocations to representatives of formerly deported peoples.

7. Provide better definition of the elements of the crime under Article 161 of the Criminal Code; introduce norms stipulating civil and administrative liability for actions directed at discriminating against individuals and groups of society.

8. Broaden the force of anti-discrimination norms to cover foreign nationals legally abiding in Ukraine

9. Draw up and pass amendments to legislation in order to provide legislative regulation for single-sex cohabitation.

XIII. PROPERTY RIGHTS[1]

1. OVERVIEW

The right to peaceful enjoyment of possessions is a crucial component of a law-based State and the development of democratic society. The right is enshrined in the Constitution of Ukraine which sets down the forms of ownership (articles 13, 41, 142 and 143), the equality of all holders of property rights (Articles 1 and 13), and guarantees of property rights and the duties of those possessing property (Articles 13 and 41). In addition, Article 41 stipulates that «everyone has the right to own, use and dispose of his or her property, and the results of his or her intellectual and creative activity. ... No one shall be unlawfully deprived of the right of property».

It is stated that providing safeguards for the property rights enshrined in the Ukrainian Constitution, the European Convention on Human Rights and Fundamental Freedoms, and Article 1 of the First Protocol to the Convention and ensuring reliable protection of all forms of property are among the main priorities for Ukraine's State policy[2]. This however sounds like yet more lofty phrases.

Unfortunately the level of protection of property rights in Ukraine remains low. This is confirmed by international studies. The International Property Rights Index (IPRI) published in early 2007, for example, placed Ukraine in fifty seventh place out of the 70 largest countries in the world.[3]

The rating was based on an overall assessment of the level of protection of property rights. A specific feature of the IPRI is that it incorporates data from different studies, surveys and indexes. These include the World Economic Forum Global Competitiveness Index; studies undertaken by the World Bank (on the investment climate, state management findings and how easy it is to do business), the Transparency International corruption perceptions index; reports from the World Trademark Association, and others.

There is irony in the fact that Ukraine can boast of only one figure: gender equality in ensuring property rights. Ukraine got a rating of 9.3 out of 12 possible in this area, the same as the UK, USA and Japan. This, however, means only that in Ukraine men and women are equally unprotected as regards property rights.

The most serious problems over property rights involve the following:

– the expropriation of real estate (for example, in order to knock down a building or to construct a new one. This includes reconstructing old residential areas, compulsory purchase of land for public needs, compulsory eviction where a building has been declared uninhabitable, and so forth;

– restrictions on the sale of agricultural land;

– «corporate raids», i.e. the unlawful or forced seizure of enterprises with the property then being formally transferred into the name of those seizing it;

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[1] Prepared by Maxim Shcherbatyuk, UHHRU

[2] Presidential Decrees «On the resolution of the Council of National Security and Defence of Ukraine» from 29.06.2005, «On measures for improving Ukraine's investment climate» and from 28.10.2005 «On measures to affirm safeguards and raise the effectiveness of property rights protection in Ukraine»

[3] Study carried out by the Property Rights Alliance: http://internationalpropertyrightsindex.org/index.php?content=cdata&country=Ukraine

– the failure to execute court rulings on payment or returning property, especially in cases where the debtor is a State body, State enterprise or institution.

2. THE MAIN PROBLEMS IN PROTECTING PROPERTY RIGHTS

Many of the problems connected with the right to peacefully enjoy ones possessions which were topical last year, the year before last and several years ago remain just as burning today. This demonstrates that the efforts of government bodies to rectify these problems are fairly ineffectual. In addition, a huge number of new challenges are appearing which present a difficult task for the government.

FAILURE TO EXECUTE COURT RULINGS PROTECTING PROPERTY RIGHTS

There remains a problem with the inefficiency of the State Bailiffs' Service which in many cases is unable to execute court rulings. This is despite the fact that the implementation of a ruling which has come into force is no less important than the handing down of such a ruling since the final and main outcome of any court proceedings should be the reinstatement of the rights and freedoms infringed or compensation for damages incurred. When only a fourth of all rulings are executed, it is difficult to speak of just satisfaction.

One consequence of the inefficient work of this Service is seen in the thousands of applications from Ukrainian nationals lodged with the European Court of Human Rights over the non-execution or lengthy delay in implementing rulings of national courts. In the last year alone, the Court issued 172 judgments against Ukraine which have already come into force. A large number of these were connected with the failure to safeguard peaceful enjoyment of people's possessions by not executing court rulings.[4]

KHERSON PENSIONER WINS HER CASE IN THE EUROPEAN COURT[5]

Natalya Patrino began her battle with the government to receive salary owed her back in 2001. She tried all courts in Ukraine and then went to the European Court of Human Rights. She didn't give in when the government offered her a disadvantageous compromise, and she won. It is unlikely that Natalya Patrino could have done it all alone. Throughout the four years she was helped by human rights defenders from the Kherson Regional Fund for Charity and Health.

When in 2000 she left her job at the central design bureau «Izumrud», she expected the business to pay her the salary owed. This is certainly what Articles 116 and 117 of the Code of Labour Laws demand. However six months passed without her receiving the money. She then turned to the court and on 24 April 2001 a local court of the Komsomolsky District ordered that the business pay Natalya Patrino's salary. This however had no effect.

Several dozen pensioners were similarly cheated by «Izumrud». They approached the public reception centre of the association «Partnership for a transparent society, and lawyers from the Kherson Regional Fund for Charity and Health, which is part of «Partnership» helped them to create a civic organization called «Justice» and gave them help in writing letters and applications.

The pensioners received some of the money owed them, however then everything went quiet again. It was then that lawyer from the Kherson Regional Fund for Charity and Health, Natalya Kozarenko, suggested that all who would like to make applications to the European Court of Human Rights. Natalya Patrino decided to take this step. The others pensioners from the business didn't dare «in case it causes problems.»

[4] Ukraine carries out European Court judgments // Yurydycheskaya praktyka. – 2007. – 30 January – № 5 (475).
[5] The newspaper «Vhoru» www.vgoru.org.

In August 2004 the European Court sent the Ukrainian Government material on the case with a request to explain why the court rulings had not been executed. Natalya Patrino received an invitation immediately to come to the accounts office in «Izumrud» to receive the pay owed her. However this was without compensation for her losses due to inflation. Despite the officials' efforts to dissuade her, she refused to withdraw her application to the European Court. She was determined to receive compensation from the Ukrainian Government for the time and stress she had wasted over three years in order to receive honestly earned wages.

And in the first days of January 2006 the European Court ordered Ukraine to pay Kherson resident Natalya Patrino 1 thousand Euros in compensation for the non–execution of a domestic court over her case. This is fairly modest compensation for the moral damages inflicted by the government. However the value of the Court's judgment lay in restoring her sense of personal dignity and in strengthening others' belief that they could defend their rights.

To a large extent this problem is caused by legislation, for example, laws establishing special rules of procedure for forced sale of the property of State-owned enterprises. In the case of a significant number of enterprises there is a moratorium in force against such sales. The direct result of this can be seen in cases like that above in the European Court of Human Rights.

On 28 May 2003 the Krasnolutsky City Court in the Luhansk region found in favour of Mr Fedorov and ordered the State enterprise «Donbasantratsyt» to pay wages owed to the sum of 1,124.27 UAH. On 11 August 2003 the relevant office of the State Bailiffs' Service began writ proceedings. In December 2005 the court ruling in favour of the claimant was fully executed. However this was after an application had already been lodged with the European Court of Human Rights. The Court in Strasbourg found that Ukraine had violated Article 6.1 of the European Convention on Human Rights and Fundamental Freedoms (the right to a fair trial), and Article 1 of the First Protocol to the Convention (the right to peaceful enjoyment of ones possessions) and ordered it to pay Mr Fedorov 50 Euros in pecuniary compensation and 500 Euros for moral damages.[6]

RESTRICTIONS ON THE SALE OF AGRICULTURAL LAND

Protection of property rights involves acknowledging owners' rights to carry out any operations with their possessions (to pawn or sell them, etc). International practice shows that economic growth and poverty reduction are best achieved where efficient producers and investors have free access to assets from means of production.

We thus need to fully resolve the issue of ownership of agricultural lands. Unfortunately, at the present time the Law «On amendments to the Land Code of Ukraine» (on prohibiting the sale of agricultural land until the passing of the relevant legislative acts) has been passed extending into 2007 the moratorium on sales of agricultural land. In order to pass this bill, the Verkhovna Rada actually overcame a Presidential veto. This is despite the fact that approximately 5.9 of the 6.8 million rural residents who have received free of charge certificates affirming their right to a piece of land (a share), have already received government acts confirming their ownership rights to the land.[7]

The delay with permission to freely sell land has a number of negative consequences:

– redistribution of land assets in favour of more efficient land users is limited;

– it prevents the introduction of mortgages which could be a means of attracting long-term funding for applying new technology and innovations;

– owners[8] are unable to exercise their legitimate right to freely dispose of their property.

According to estimates from the Institute of Agrarian Economics of the Ukrainian Academy of Agrarian Sciences, the overall value of available land in the country comes to 50 billion US dollars. The lack of a market for agricultural land makes it impossible to verify this estimate. The figure,

[6] Judgment of the European Court of Human Rights in the Case of Fedorov v. Ukraine (No. 43121/04) from 9 November 2006 року.

[7] «The State and the Citizen: Delivering on Promises», Analysis of socio-economic policy carried out by the Blue Ribbon Commission in 2006.

[8] In what follows, we are avoiding the word «landowner» as having specific connotations. The land owned here was that which in Soviet times remained the possession of the State (*translator*)

however, is 17 times higher than the 3 million dollars which were invested in agricultural production between 2001 and 2006.

Supporters of the moratorium claim that people who have come into possession of land are still not ready to dispose of their land. They argue that they don't know its value and will sell it for far less than the market value, and also there is as yet no normative base for avoiding such anomalies. Some of these assertions have truth to them: some important draft laws (for example, «On the land market») have been awaiting consideration in the Verkhovna Rada for several years already. However it is of no less importance that the moratorium is not fully observed, this meaning that precisely those violations which it is supposed to avert are in fact taking place.

According to data from the State Committee of Ukraine on Land Resources, as of 2006 there were 95 thousand notarized agreements on the granting of land (shares). 2.5 thousand people exchanged their land for other assets and over 13 thousand sold their land. There were also a large number of cases where agreements were fixed for excessively long lease contracts. These overt infringements of the moratorium demonstrate the inexpediency of restraining market relations concerning land. Further procrastination in cancelling the moratorium will merely lead to an increase in the huge shadow land market. This will not be to the benefit of the original owners of the land – the rural people who work this land.[9]

The cancellation, as soon as feasible, of the moratorium together with the adoption of the relevant long-awaited laws, will bring a fair number of positive results. Firstly, successful agricultural goods producers will be able to rely less on the State budget as regards subsidies. Secondly, the introduction of security on agricultural land would help to lower the interest on loans and would make them more accessible for small and medium-size farms. And finally, rural residents wishing to engage in other types of business, not agricultural production in the rural area, would be able to divide or mortgage their land, receiving in this way the initial capital to start their business.

LACK OF PROPER PROTECTION BY THE GOVERNMENT OF PROPERTY RIGHTS

Another problem which has remained unresolved for many years now is the widespread swindling and extortion involving private property practised by unscrupulous firms and individuals. This includes both real estate and company shares. These kinds of operations flourish as a result of the unreliable system of registration of property rights, inadequate regulation of corporate governance practices and a weak legislative base for matters pertaining to bankruptcy. All of these failings were made use of in 2006 to infringe property rights. The lack of proper mechanisms for protecting property is a problem in attracting domestic and foreign investment, and also prevents the use of the potential of the stock market for developing production[10]

It is worth noting in this context that the Verkhovna Rada has not managed since March 2003 to consider and adopt a new edition of the Law «On joint stock companies» aimed at providing comprehensive regulation for corporate governance, and at safeguarding the rights of all, but especially small-scale, shareholders. There has instead been a political struggle to lobby certain amendments to existing corporate legislation in order to resolve certain isolated issues. A good example of this was seen in the saga with the Law «On amendments to the Law of Ukraine «On economic associations» on reducing the quorum threshold for holding general meetings of an economic association» which has been repeatedly passed by the Verkhovna Rada and vetoed by the President. The draft law proposes amendments and supplements to Articles 41 and 60 of the Law «On economic associations» which envisage that if a general shareholders' meeting has been unable to take place due to an insufficient number of shareholders present, then the next meeting will be considered to have a quorum if the number present have more than 50% of the votes.

The draft law resolves the problems experienced by owners of individual enterprises, but does absolutely nothing for solving the overall problem. The issue is indeed extremely difficult since at present there is extremely weak protection for shareholders' rights in Ukraine. Legislation does not

[9] «The State and the Citizen: Delivering on Promises», Analysis of socio-economic policy carried out by the Blue Ribbon Commission in 2006

[10] Ibid.

impose additional requirements on joint stock companies or on their boards in cases involving a merger, nor supplementary mechanisms and means of protection of the rights of the shareholders in the company being merged. In Ukraine there is no right stipulated for a shareholder to object where a merger decision has been taken, nor is there a legal framework for operations involving the use of insider information[11]

The following examples indicate the problems faced in protecting the rights of small-scale shareholders.

In 2006 small-scale shareholders in the local metallurgic giants – the Nikopol Ferroalloy Plant and the Nikopol Pipe-making works [Nikopolsky Pivdennotrubny zavod] fought to assert their rights. On 28 August 2006 near the city museum, a meeting was held of the «Union of small-scale shareholders in Nikopol enterprises». Those present spoke of their headaches traipsing around the authorities trying to establish the truth and receive the dividends on their shares from the real owners of the enterprises. The main aim of these small-scale shareholders is to have the Law «On the protection of small-scale owners» passed. They have approached all five factions who entered the Verkhovna Rada after the 2006 elections on two occasions. However no political faction, other than the Bloc of Yulia Tymoshenko [BYuT] has responded to their appeal. The shareholders are also disturbed by the fact that of the billions in profits received by these metallurgic giants, virtually nothing reaches the local State budgets, and nothing is left over for dividends. The shareholders' meetings planned for 5, and then 12 September, .failed to take place because the representatives of the State Property Fund were not ready.

The first case Ukraine lost in the European Court of Human Rights (Sovtransavto Holdings v. Ukraine) also related to the problem of minority shareholders' rights. Following a decision by the major shareholders, the share capital of the company was increased, this automatically leading to a reduction in the share of minority shareholders in the company's property. The lack of legislative regulation protecting minority shareholders was found to have infringed the European Convention on Human Rights. This European Court judgment regarding general measures for resolving the problem remain unimplemented to the present day.

Shareholders' rights in Ukraine are defended largely through the courts in accordance with Article 124 of the Constitution. An analysis of case law shows that most suits are connected with declaring invalid the decisions passed by general meetings or with the payment of dividends. Such claims are lodged by individual shareholders against the joint stock company. The mechanism for filing «collective suits» devised in the legislation of other countries, for example, USA, has not been allowed for in Ukrainian corporative legislation, nor in fact is the right of shareholders to file such claims established. Many gaps also emerge when bringing to answer people who have caused material damage to shareholders, etc. A resolution to these problems in defending shareholders' rights can only be achieved through the adoption of a comprehensive law providing vital safeguards for property rights.

Nor can we leave aside the problem of «corporate raids» in Ukraine which has become particularly acute over recent years and which was described by the Prime Minister in February 2007 as a «nationwide problem»[12] The Ukrainian Trade Union of Industrialists and Entrepreneurs assert, for example, that over the last two years over 2 thousand businesses have faced «corporate raids». According to other estimates, more than 3 thousand items of property have been seized by corporate raiders. . Such corporate raiders have already been divided into «white», «grey», «black» and «wild», and the so-called experts have determined the biggest and most successful.[13]

Since the scenarios and methods for takeovers are fairly standard, some are staggered by the helplessness of the legal system, insist on government intervention and create inter-departmental groups to fight the phenomenon. Others, however, view this with scepticism and assert that the creation of such a body under the control of bureaucrats has only made the situation more complicated. While some fight for reforms to legislation and even for a special law to be passed, others say that there is no need for this.

[11] N.S. Kuznetsova: «Corporate governance in Ukraine».
[12] Information from the Internet publication «Forum» ua.for-ua.com/ukraine/2007/02/02/084823.html
[13] V. Piskovy: Corporate raids: the reality of the myth. // Dzerkalo tyzhnya – 2006. – 23-29 December – № 49 (628). www.zn.kiev.ua/nn/show/628/55441/

In 2006 the Verkhovna Rada was actively engaged in efforts to reform the legislative base with regard to corporate raids. These included the adoption of a Law «On amendments to some legislative acts of Ukraine (regarding the delineation of cases for examination in economic courts and in general courts)». The Law introduced amendments to the Economic Procedure Code, the Civil Procedure Code, the Code of Administrative Justice, as well as to the Law «On privatization of State property» on a clearly demarcation between disputes regarding privatization and corporate rights which need to be examined in economic, administrative or general jurisdiction courts. This law alone is, however, unable to overcome the problem of corporate raids.

In the media corporate takeovers are, as a rule, presented as reflecting the ineffective methods used by the law enforcement agencies to combat corporate raids. The suggestion being that it would be sufficient to merely counter a forced takeover by means of an effective government security structure, and the success rate for such seizures would be minimized. The idea remains current that it is due to the lack of professional guards that raiders succeed in getting into an enterprise and consequently seizing the necessary documentation.

In fact the problem is much deeper than the commentaries of law enforcement staff and the professional assumptions of interested parties would suggest. Corporate raiding requires legal analysis and a clear understanding of the sources of the conflict since forced takeovers are generally the «epilogue» to the actual violation of the rights of minority shareholders. Corporate raiding is not an independent or separate process, but simply the result of legislative gaps in safeguarding the rights of small-scale shareholders.

Current legislation does not regulate the status of such minority shareholders. This results in endless court disputes between majority and minority shareholders. This takes place under conditions, for example, when just before a general meeting of the company, a minority shareholder lodges a claim with the court against the company alleging infringement of his/her rights as a shareholder, and asking that the company's securities be frozen and the general meeting be stopped. As a result, the general meeting which takes place without the minority shareholder changes the managerial bodies and the business has a new management. However, while the dispute regarding the legitimacy of the general meeting's decision is being considered by the court, the functioning of the business is totally paralyzed.

In order to avoid the phenomenon of corporate raids, the rights of «small» shareholders must be established to ensure that they can uphold their interests with the authorities and bodies of local self-government by means of uniting in unions of minority shareholders. A minority shareholder must be entitled to demand that a joint stock company redeems his/her shares if he or she voted against a decision taken by the general meeting to reorganize the company. In the event of extra emissions, the market value of the shares must be entirely paid up to the moment that the right of ownership to these was registered.[14]

PROBLEMS IN REGISTERING RIGHTS TO REAL ESTATE AND THEIR RESTRICTION

It is worth also considering the problems that arise when registering ones right to real estate and limitations on such rights. Although the Law «On State registration of material rights to real estate and limitations of these rights» was passed back in 2004, a fully-fledged system has yet to be created. This gives crooks ample opportunity to make use of shortcomings in legislation. This is compounded by the fact that the State Committee on Land Resources which has been vested with the responsibility to register rights to real estate was not ready to carry out these functions and the register has yet to begin functioning properly.

In 2006 State registration of real estate was made the responsibility of the Ministry of Justice. This was on the basis of a decision by the Cabinet of Ministers however in the absence of amendments to the base law doubts arose as to the legitimacy of transferring these functions. There is thus a lack of legal clarity which makes it impossible to be certain of the guaranteed protection of people's right to their own possessions. Only at the end of 2006 was a draft law tabled in the Verkhovna Rada

[14] «Justus – information bulletin» 19 October 2006.

which was aimed at introducing amendments to the Law «On State registration of material rights to real estate and limitations of these rights» which should finally resolve this problem.[15]

As well as protecting the right to own immovable property, the State must also safeguard property rights to other possessions, including vehicles. Here problems also arise.

One can cite as an example the situation with the towing away of cars in Kyiv. The State authorities explain the need for such forced removals as being the huge number of illegally parked cars cluttering the streets. The capital's leaders are particularly disturbed by the narrow streets adjacent to Khreshchatyk which are virtually impassable with cars parked in several rows and on the pavement. However the legality of such actions would not appear to bother them. The formal grounds for removal are the «Rules for improvement of the territory, the parking of vehicles, peace and quiet in public places and vending at markets in the city of Kyiv», passed by the Kyiv City State Administration on 26 September 2002. These state that the removal of cars which infringed parking rulings is permissible however only in cases where the car «poses a danger to traffic or pedestrians, or where it hampers work on maintaining roads, planting greenery or obstructs buildings and constructions near the road.» In practice, employees of «Kyivparkservice» most often take away those cars which are technically easiest to load onto the tow truck, rather than those which block a pedestrian crossing or could get in the way of an ambulance.

This ruling by the Kyiv City State Administration in fact runs counter to current legislation. A car is a form of private property and is, in accordance with the Constitution, inviolable. Article 92 of the Constitution states that the legal regime of property (including the possibility of limiting property rights) can only be defined by law, that is, by a normative act passed by the Verkhovna Rada. The Kyiv City State Administration [KCSA] is not a legislative body, yet it has imposed restrictions on the right of property to the vehicles removed (since they cannot be used until a fine is paid). The appropriate legal status is vested in the Code of Administrative Offences which stipulates liability for infringements of the Rode Code. According to the Code, a fine is envisaged for stopping and parking offences of between 3.4 and 8.5 UAH (with the decision to fine being taken by a court), but certainly not forced removal. The fact that the ruling of the KCSA from 2002 is unlawful is confirmed also by the fact that in 2005 the Shevchenkivsky District Court, and soon after that the Kyiv Court of Appeal revoked the ruling as regards towing away vehicles. Given the above arguments, there are grounds for classifying forced removal as no less than the «unlawful seizure of a vehicle, regardless of the purpose, by an organized group». And this is already the definition of the crime set down in the Ukrainian Criminal Code (Article 289 § 3) which envisages for its perpetrators from10-15 years imprisonment with confiscation of property16

Interestingly, at the end of 2005 another point regarding unlawful limitations on property rights with regard to cars from the same ruling of the KCSA was revoked. This concerned the clamping of illegally parked cars. The legal suit was filed by the present Mayor of Kyiv Leonid Chernovetsky who in 2005 was only standing for office. Yet by the summer of 2006 at his initiative the tow trucks once again appeared on the streets. The legal grounds for this were quickly «readjusted» with the Kyiv Prosecutor's Office withdrawing its application to the Shevchenkivsky District Court against the Kyiv City State Administration from 30 August 2005, according to which the removal of cars had been declared unlawful. The provisions on forced removal of vehicles passed by the Kyiv City State Administration in 2002 have thus once again come into effect. At the beginning of summer, the tow trucks did not impound the cars, but simply moved them to another place, thus freeing the way for traffic. However, by 4 July the capital's Administration had approved a range of tariffs for tow-away» services. If a year ago, a car owner whose car got impounded had to pay 100 – 125 UAH, now the fines are much higher. They now depend on the age of the car towed away, and the size of its engine. For example, the owner of a top-class foreign make (on the road for less than 5 years) has to pay for these imposed services from 700 to 1,100 or more UAH (depending how long it was impounded and the distance from the parking place). On an average day, around 50 cars are

[15] The Government suggests giving the Ministry of Justice the authority for registering ownership rights to real estate. www.kmu.gov.ua/control/publish/article?art_id=55891095

[16] P. Khodovy. Nowhere to park – pay for being towed away // Dzerkalo tyznya. – 2006. – 7–13 October. – № 38 (617). www.zn.kiev.ua/nn/show/617/54728/

impounded in this way (the number cannot go higher since there aren't enough tow trucks which the Kyiv authorities are presently actively buying). It is not difficult to estimate that as a result, the city's revenue is supplemented by at least 35 thousand UAH per day (or more than one million per month). The situation with tow trucks is yet one more example of where filling the State coffers is considered more important than observing the human right to freely enjoy one's possessions.

3. PROBLEMS LINKED WITH REMOVING PROPERTY RIGHTS

Many problems in Ukraine are connected with the government safeguarding legality when depriving people of the right to peacefully enjoy their possessions. In connection with this, one can also point out problems over privatization, over the expropriation of property in the public interest, over unilateral failure by the authorities to honour contracts, over deprivation of property as the result of certain corporate raiding actions, etc. These problems seriously hinder the government from safeguarding property rights.

The long-term lack of transparency, as well as serious irregularities, over privatization has resulted in a huge number of disputes over privatized property. The main problem is that there is no actual owner capable of dragging the business out of the crisis it finds itself in. The most burning issue therefore in 2006 was to ensure open privatization which fully complied with legislation and did not arouse doubts in any of the parties. A large number of challenges remain as far as privatization is concerned since the government continues to own a considerable amount of property in many major industrial complexes with their related infrastructure. However any approach to privatization in the future will need to take past mistakes into consideration. In those sectors where enterprises have a legally established monopoly, the normative base and authorized regulatory bodies will need to be totally prepared to begin privatizing their plants. Companies from all other sectors, conceivably with the exception of strategically important State enterprises must be privatized, and it is crucial that the privatization process be transparent. As well as a considerable increase in revenue, this approach will allow for corporate governance of the part played by the State in these companies. Under such conditions, possession of shares often leads to accusations of corruption and to unequal conditions of competition for companies working in Ukraine. And finally, the practice must be stopped of establishing excessively short periods for tenders (as compared to those set down in legislation), and of infringements in transparency of both the tender process and the strategy for preparing plants, etc for privatization.

Government authorities and institutions still fail to meet their agreed commitments this leading to people losing their possessions. Courts in such situations usually take the side of the government. There remains then no other alternative but to approach the European Court of Human Rights.

THE CASE OF «FEDORENKO V. UKRAINE»[17]

On 9 April 1997 Fedorenko sold his house for 35,000 to the Kirovograd Regional Department of Justice (hereafter «the Department»), responsible for the logistical support of the judiciary. The Department was represented in the transaction by Mr R., the President of the Malaya Vyska City Court. The contract was certified by a notary and specified that the purchase price had to be paid in two instalments: UAH 5,000 and 30,000 to be paid by 1 May 1997 and 1 September 1997 respectively. The contract also contained a clause stating the following:

«Should the exchange rate of the Hryvna depreciate, the overall sum to be paid cannot be less than the Hryvna equivalent of USD 17,000.»

In June 1997 Fedorenko was paid UAH 5,000. In 1998 the Hryvna substantially weakened against the US dollar. In October 1998 and August 1999 the applicant received UAH 11,000 and 20,000 respectively. Fedorenko instituted

[17] Judgment of the European Court of Human Rights in the Case of Fedorenko v. Ukraine, 1 June 2006 (No. 25921/02) (the transliteration used is that of the ECHR judgment).

proceedings against the Department, claiming that it had failed to fulfil its obligations under the contract, as the sum paid did not take into account the substantial depreciation of the exchange rate of the Hryvna. Thus, according to the applicant, he had lost some USD 6,553.

The courts took different attitudes to this dispute, however the final ruling cancelled the point in the Agreement on the grounds that it contradicted Ukrainian legislation, and Fedorenko was only awarded statutory interest at the rate of 3% per annum in compensation for the delay in implementing the Agreement (678.5 UAH in all). He then, in 2002, lodged an application with the European Court of Human Rights. .

The European Court found that Ukraine had violated Fedorenko's right to peaceful enjoyment of his possession.

The Court first found that Fedorenko's expectations should be treated as possessions in the understanding of Article 1 of the First Protocol to the Convention, although the Government had asserted that the disputed clause did not constitute a «possession».

The Court also stated that it was primarily for the national authorities, notably the courts, to resolve problems of the interpretation of domestic legislation, Therefore, whatever doubt there may be as to the authorities' construction of the provisions of the 1993 Decree in the present case, the Court accepts that the clause in issue was lawfully invalidated by the domestic courts.

The Court, however, found that the interference with Fedorenko's right to peacefully enjoy his possessions had not been justified. It pointed out that the compensation had borne no relation to the rate of inflation and had had clearly been inadequate to compensate the applicant for the adverse effects of depreciation. The Court also pointed out that the Court of Appeal, having found the impugned clause to be unlawful, did not invalidate the whole contract, which would have required the restoration of the parties to their original situation (see paragraph 14 above). Instead, it greatly decreased the applicant's gains from the transaction simply by finding that the amount already paid constituted sufficient compliance with the Department's contractual obligations.

The European Court awarded Fedorenko EUR 5,890 in respect of pecuniary damage; EUR 1,000 in respect of non-pecuniary damage; and EUR 700 (seven hundred euros) in respect of costs and expenses.

Another extremely important issue is sufficient guarantees from the government when people's right to property is forcibly removed.

In this context we must mention the Law «On comprehensive reconstruction of residential areas (micro-districts) from the obsolete housing fund», adopted by the Verkhovna Rada and signed by the President. At the end of 2006 the Ukrainian Helsinki Human Rights Union called on the President to use his power of veto, stating that the law which the President had previously vetoed was better than its predecessor, but that it nonetheless seriously undermined the protection of property rights.

UHHRU is convinced that the law fails to provide sufficient guarantees for citizens' rights to property and housing, and it also has a number of shortcomings which will make it difficult to apply.

It is also a framework law without sufficient attention having been given to procedure and details which will need to be drawn up as subordinate legislation. On the one hand this can be justified by the huge volume of legal regulation. On the other hand, however, the procedure in such a law is the foundation for any guarantees against arbitrary eviction of people from their homes or the forced removal of other possessions.

The law does not clearly set out the overall order of activities during reconstruction. It lacks, for example, a scheme of work and conditions for the removal of property in connection with reconstruction and the relocation of owners and tenants. However the main problem is that the law does not envisage mechanisms for overseeing the fulfilment of commitments by both investors and public authorities or bodies of local self-government. Nor does it set out liability for breaching these commitments, including cases where these breaches are by officials of the said bodies. Clearly these issues cannot be resolved at the level of subordinate legislation. Yet without the appropriate level of

control, the given law could become a mechanism enabling large construction companies to deprive individuals not well-versed in legal questions of their property.

According to the First Protocol to the European Convention on Human Rights, when removing property in the public interest, the State is responsible for observing a person's entitlement to peaceful enjoyment of his or her possessions. Regardless, therefore, of whether by law the State has transferred its problems to commercial enterprises, it is the State itself which will be respondent in the European Court of Human Rights. The State has effectively passed to businesses its role in protecting property rights in such instances.

While undoubtedly some efforts have been made in Article 12 to regulate and guarantee the rights of those who are being re-housed in connection with major reconstruction, the guarantees are not clear, and, as mentioned, there are no control mechanisms or punishment of those guilty of violations. Still less regulated are the rights of the owners (tenants) of non-residential premises, country residential buildings and sites falling into reconstruction zones.

From the point of view of protection of the right to housing and to own, use and dispose of ones possessions as foreseen in the Constitution, as well as the right to peacefully enjoy ones possessions as set out in the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, the following must be provided when evicting people:

- A mechanism for eviction, expropriation of property and objects of other material rights;
- Procedure for preliminary compensation (defining the area and number of rooms which is provided as compensation; the state in which the property is handed over, the location of this property, or the procedure for determining and paying out pecuniary compensation). In this procedure there should first be a definition and provision of compensation, and only then can the expropriation of property take place;
- Valuation of the property in the case of pecuniary compensation, as well as the issue of payment of taxes and fees thereby arising;
- The legal regulation of the transfer and obtaining of rights to the new property;
- A control mechanism over carrying out the compensation procedure;
- Forced eviction and the observance of the rights of owners (tenants) in the course of the eviction;
- Liability for violation of the procedure for providing compensation and control over this.

It must be emphasized that the State is effectively distancing itself from this area of relations, confining itself only to establishing a model contract between builder and owner of the flat when removing the property in the public interest. Yet, as we have mentioned, it will be the State which answers for the actions of private individuals in such cases before the European Court of Human Rights. UHHRU considers that the role defined in the law is clearly not sufficient. The State must ensure effective control against abuse in this area since otherwise this could serve as yet another method for cheating people18 On the other hand, such actions by the State lead to expenditure from public funds given the need to pay out compensation for the forced removal of property and inadequate actions of private commercial organizations.

The President, nonetheless, signed the law, stating that this was justified by the «inadmissibility of further procrastination with reconstruction, and also taking into account the need to create new mechanisms for stimulating the development of residential construction work and attracting investors»[19]

The President did, admittedly, send letters to the Verkhovna Rada and the Cabinet of Ministers with a considerable list of comments and the request to further improve legislative regulation in this area.

His letters point to a number of failings in the law passed which require swift regulation. These include the provisions on bodies of local self-government themselves determining the procedure and time periods for resettling residents, the vacating of residential and non-residential buildings (Arti-

[18] UHHRU call for the President's veto on a law which could endanger property rights. See the full text in English at: http://www.helsinki.org.ua/en/index.php?id=1167312324 .

[19] The President ignores UHHRU call to veto law jeopardizing property rights http://www.helsinki.org.ua/en/index.php?id=1168604880.

cle 7), as well as the provisions on prohibiting, after state registration of a ruling to classify property as part of the obsolete housing fund, any actions aimed at changing the owner of these buildings or broaden their rights on resettlement (Article 16). The latter could in practice lead, for example, to it being impossible for parents to register their new-born babies at their place of residence which would immediately impinge upon their constitutionally guaranteed rights. It remains unclear, however, whether the President's instructions will be implemented, and if so, when. Many other such instructions have remained on paper.

Meanwhile the law, which presents a serious threat to Ukrainians' property rights, has already come into force. One must expect an increase in the number of conflicts in this area and a rise in the number of Ukrainians made homeless.

Another fundamental attack on the right to freely enjoys ones possessions came with the draft law «On the organizational and legal principles for expropriating (redeeming) privately-owned land»20, which has already been accepted in its first reading.

The Verkhovna Rada Scientific Expert Assessment Department in its assessment of the draft law states that the concept «the public interest» is not clearly defined in the document, with it being used variously in different articles. It also points out that a refusal by the owner of land to be bought out could lead to forced expropriation on the grounds of the public interest, whereas according to Article 41 of the Constitution, this is only possible as an exception. Such exceptional cases for the expropriation of land in the public interest must be directly specified in the draft law. Furthermore, the definition of exceptional circumstances must apply not only to expropriation of land under normal conditions, but also under martial law or a state of emergency. It is also important that such forced land expropriation in the public interest during martial law or a state of emergency be defined in very general terms, without stipulating detailed procedure. For example, the draft law should not only cover the suspension of the right of ownership to property (a residential building, other buildings, constructions or planted areas on the land which is being expropriated under Article 26), but also the return of the property once martial law or a state of emergency has been cancelled. In addition, the draft law does not envisage the possibility for the former owners of land to receive compensation for the value of the property even before the revoking of martial law or the state of emergency[21]

Ukraine already has a huge number of victims of machinations with real estate.

These are, for example, the people who lost their property because of the construction holding company «Elite-Centre». That company took money, supposedly for building nine residential blocks in Kyiv: two on Schmidt St, two on the Heroes of Stalingrad St (Obolon region), two on Petro Zaporozhyts St, and Kurnatovsky St (both the latter in Voskresenka), one on Builders' St (Darnytsa) and the biggest on Laboratorna St in the district of Palats «Ukraina». In reality the only construction work was at the site on Schmidt St, although in actual fact what was being built there was not the promised residential block, but a shopping and office centre. The criminal investigation established that there had been double and even triple contracts agreed for the same flats. When the law enforcement agencies got involved, the owners of the holding company, together with the money, disappeared. 898 victims of the fraud have given statements to the police. At the beginning of February, the committee of investors in the construction investment group «Elite-Centre». stated that the management of the company had stolen around 100 million dollars invested. The police estimate that around 1.5 thousand people will have suffered as a result of the crime.[22] It should be noted that the investigation established that some officials from the Kyiv City State Administration had not exercised proper control over the use of land designated for residential and office complexes and had also not given timely consideration to applications for building permits. This behaviour by the authorities had contributed to the swindle having taken place.

This type of fraud has been practised, particularly in the regions, by some other construction companies. For example, Lviv residents were conned out of more than one million UAH by construction crooks. Over two years the latter had concluded agreements with clients for a part share

[20] Draft law «On the organizational and legal principles for expropriating (redeeming) privately-owned land». gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=27993

[21] The opinion given by the Verkhovna Rada Scientific Expert Assessment Department on the draft law «On the organizational and legal principles for expropriating (redeeming) privately-owned land»: www.rada.gov.ua.

[22] Investors in «Elite-Centre» have begun receiving rooms in hostels. // The Internet publication «Korespondent» ua.korrespondent.net/main/52487

in financing the construction of residential accommodation, without having any of the necessary permits for this. Staff of this organization acquired premises on a Lviv street for the purpose of restoring old buildings and building a residential and office complex. After this, during 2005 and 2006, they took money from people wanting to get flats, without having the necessary construction documentation. During that time Lviv residents paid the crooks over a million UAH.[23]

At the beginning of February the President signed a new version of the Law «On planning and carrying out construction work» which intensifies control over the obtaining of building permits. According to the new law, it will now be necessary not only to provide the executive bodies of the relevant councils or the Kyiv and Sevastopol City State Administrations with the documents listed in Article 24 of the Law «On planning and carrying out construction work» but to also submit the financial reports of the relevant legal entity, copies of their licences for carrying out construction work, as well as for providing financial services. It is envisaged that failure to provide these documents in full, the lack of them or an adverse overall assessment following their review will be grounds for turning down the application for a building permit. The President vetoed the previous version of this law from 12 December 2006 over restrictions in competition through the law.

There are other problems connected with land ownership rights. We could mention among them the conflict over land rights between members of the Crimean Tatar community and local businesspeople. These disputes often result in clashes between the opposing sides, as was the case recently in Simferopol. The dispute was between Crimean Tatars and a construction company with the former asserting that the construction work was illegal since the land should be designated for housing for Crimean Tatars. The other party, in turn, having armed themselves with a court ruling regarding the legality of the construction on the site, attempted to drive the Crimean Tatars away, which lead to clashes.[24] In August 2006 a conflict over land arose in Bakchysaraj where members of the Crimean Tatar community protested at the extension of the city market because this was on land which was once a Muslim burial ground. This conflict also ended in clashes[25]

There are many such cases in the Crimea, with virtually all of them caused by the fact that the State has still not taken a clear position on the right of ownership of the land which returning Crimean Tatars occupied. This in turn leads to inter-ethnic tension in the region.

4. RECOMMENDATIONS

1) Pay particular attention to the enforcement of court rulings regarding property rights, for example, where these award amounts of money, order that possessions be returned, or that actions damaging or seizing the possessions be halted;

2) Formalize property rights on particular types of property, for example, introduce documents which confirm ownership of certain items (for example, shares, etc);

3) Improve the mechanisms for registration of land ownership rights and for restrictions of such rights;

4) Ensure clear legal regulation and just procedure where real estate is forcibly bought out in the public interest, for example, residential blocks and flats, land, etc. Here it is necessary to ensure the individual's right to commensurate and fair compensation for the property expropriated. The designation and provision of such compensation should precede the actual expropriation. The valuation of the property involved must be made on the basis of the current prices;

5) Cancel the moratorium on compulsory sale of State property;

6) Cancel the moratorium on buying and selling land in order to develop rural areas, attract investment in agricultural production; put an end also to the shadow means of selling land which are presently used;

[23] Financial-Construction pyramid uncovered in the capital of Halychyna. // The newspaper «Ukraina moloda», www.umoloda.kiev.ua/number/838/116/30523

[24] Based on information from TV Channel 5: 5tv.com.ua/rus/newsline/232/0/35874/

[25] «Crimean fountain of tears» // The newspaper «Stolichniye novosti» – 2006. – 15–21 August . – № 31 (418).

7) Ensure the implementation of legislative provisions guaranteeing supplementary payment to certain groups of people, for example, teachers, those deported, their children and families in returning to Ukraine, military servicemen and others;

8) Debate on a wide scale and pass a Law «On joint stock companies» stipulating the main rules for corporate governance, as well as safeguarding the ownership rights of all, but especially small-scale shareholders;

9) Continue refining the legislative base on preventive corporate raid seizures of enterprises, by paying attention in the first instance to regulating the rights of minority shareholders since it is the violation of these rights which in many cases leads to corporate raiding;

10) Ensure openness and transparency in privatization, as well as resolving issues linked with the fulfilment by owners of privatized enterprises of their investment obligations;

11) Ensure control over investment in construction of residential accommodation in order to prevent fraud and abuse.

XIV. SOME ASPECTS OF SOCIO-ECONOMIC RIGHTS[1]

The basic international documents establishing minimum standards for social and economic rights are the International Covenant on Economic, Social and Cultural Rights. the European Convention on Social Security and the European Social Charter. These are aimed at giving real substance to the provisions affirmed in the Universal Declaration of Human Rights. (1948).

Ukraine's ratification of the European Social Charter in 2006[2] which carries with it the commitment to implement its provisions serves once again to emphasize the importance of this category of rights for the country. In fact, however, not all of the Charter's provisions have been ratified, these being up to Article 27 (including six of the nine which are mandatory in accordance with Part III of the Charter: 1,5, 6, 7, 16 and 20) as well as 74 points. As Deputy to the Minister of the Ministry of Employment Natalya Ivanova stated, at the present time it is impossible to say whether the three other mandatory Articles can be ratified in 2007 since Ukraine needs to find an additional 2.5 billion UAH in order to fully ensure implementation of its commitments under these Articles.[3]

According to the provisions of the European Social Charter, each State must present annual reports on how they have applied the Charter. According to Henrik Kristensen, Executive Secretary of the Secretariat of the European Social Charter, Ukraine is due to present its first report in October 2008. The reporting is dividing into four thematic groups, namely: employment, training and equal opportunities; health care, social security and social protection; labour rights; children, families, migrants. Each State must present a report on one of these groups once in four years. The European Social Charter could in general become an important vehicle for the creation of effective mechanisms for defending socio-economic rights in Ukraine.

The Ukrainian Constitution affirms the following socio-economic rights:

– Everyone has the right to a standard of living sufficient for himself or herself and his or her family that includes adequate nutrition, clothing and housing (Article 48);

– Citizens have the right to social protection that includes the right to provision in cases of complete, partial or temporary disability, the loss of the principal wage-earner, unemployment due to circumstances beyond their control and also in old age, and in other cases established by law (Article 46);

– Everyone has the right to labour, including the possibility to earn one's living by labour that he or she freely chooses or to which he or she freely agrees.

– The State creates conditions for citizens to fully realise their right to labour, guarantees equal opportunities in the choice of profession and of types of labour activity, implements programmes of vocational education, training and retraining of personnel according to the needs of society.

– Everyone has the right to proper, safe and healthy work conditions and to remuneration no less than the minimum wage as determined by law.

– The employment of women and minors for work that is hazardous to their health is prohibited.

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[1] Prepared by Maxim Shcherbatyuk, UHHRU.

[2] The European Social Charter (revised). The Charter is ratified with applications by Law No. 137-V from 14.09.: http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=994_062.

[3] The European Social Charter (revised) has come into force. Information from the Ministry of Employment and Social Policy. http://mlsp.gov.ua/control/uk/index

– Citizens are guaranteed protection from unlawful dismissal. The right to timely payment for labour is protected by law. (Article 43)

In addition, the Constitution guarantees each citizen the right to health protection, medical care and medical insurance (Article 49) and the right to education (Article 53).

However these provisions are of an overly populist nature and undermine confidence in the Constitution as a law of direct force, since they will never be achieved as fully as suggested in the text. It would be much more correct to state that the substance and commitments of the State to ensure these rights are defined in separate laws.

There are a huge number of laws and subordinate normative acts for ensuring socio-economic rights. These do not constitute an integrated whole and in many cases are not adequate to safeguard these rights. The State also lacks the financial resources to implement what is declared in the Constitution.

1. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

The level to which the State safeguards this right indicates its commitment to ensuring the welfare of its population and to the social focus set out in the Constitution. The quality of life is in general a difficult concept containing a number of economic, political and social parameters.

There are several quite different methods for estimating the quality of life, with these apply anywhere from three to twelve parameters. The simplest (and most heavily criticized) is the Physical Quality of Life Index proposed by David Morris. This contains only three factors: infant mortality; life expectancy at the age of one, and basic literacy. An economic component is not taken into consideration at all. In the evaluation system applied by the UN there are four parameters: life expectancy at birth; literacy among the adult population; the spread of all forms of education and the Gross National Product in dollars per head of population[4]

Two other systems for determining quality of life are more complex. Each has nine factors, but these differ considerably. The first is the London-based Economist Intelligence Unit's Quality of Life Index. This offers the following factors and indicators for them: 1. Material wellbeing, measured in GDP per person in dollars; 2 Health: Life expectancy at birth; 3. Political stability and security; 4. Family life: divorce rate; 5. Community life (including church attendance); 6. Climate and geography; 7. Job security: unemployment rate; 8. Political freedom; 9. Gender equality. Of the countries in their study, Ukraine was only in 98th position.

The second index with nine factors was first proposed 25 years ago by the organization International Living, Their factors are: 1. The cost of living; 2. Leisure and recreation; 3. The economic level; 4. The state of the environment; 5. Civil liberties; 6. Health; 7. The development of infrastructure; 8. Personal security; 9. Climatic conditions[5]

In order to assess the situation in Ukraine, we can cite the following data. A sociological survey[6] showed that on average Ukrainians receive 780 UAH per family member, while they consider that an average income of 1,638 UAH is sufficient to have a normal life. At the same time, 7% of the respondents said that they had to economize even on food. 20% had enough for food, but needed to save or borrow to buy clothes or shoes. This would suggest that more than a quarter of the Ukrainian population is living below the poverty line. 34% of those surveyed said that they had enough for food and necessary clothing, but purchases like a good suit, a mobile telephone or the most basic appliances were already problematical. 26% reported big problems in buying large appliances. Only 11% of those surveyed said that the only difficult purchases would be a car, land for a dacha or a flat.

[4] I. Gusachenko Maybe not brilliant but somewhere we manage to live // Dzerkalo tyzhnya № 30 (609) from 5-19 August 2006 www.zn.kiev.ua/ie/show/609/54150/

[5] Ibid.

[6] The survey was carried out by the Ukrainian Institute for Social Research and the Social Monitoring Centre from 5 to 12 December 2006 in all regions of the country. 2,279 people in total were surveyed..

The same survey showed that 41% of the respondents rated their material situation as average; 31% – lower than average; 14% – low and 4% said that it was very low. It should be mentioned that by no means all of the 7% who reported having to be frugal with food items rated their material situation as being very low. Furthermore with an average desired monthly income per member of the family of 1,638, requirements differed significantly depending where a person living. Those in rural areas said that 1,358 would be sufficient per person per month, while those who lived in towns and cities estimated they would need 1,537, with the figure for regional centres reaching 2,053 UAH.

The issue of poverty can thus be seen to be quite acute. State policy needs to resolve issues connected in the first instance with a proper level of pay for workers in all spheres of the economy, State guaranteed income for vulnerable groups in society via social benefits on the basis of social standards and guarantees of employment as a means of ensuring a reliable source of income for workers.

However at the present time we see a fairly unique situation with poverty where the problem is most acute for the working part of the population. According to the Minister of Employment and Social Policy M. Papiyev, as of June 2006 814 thousand people had pay lower than the legally fixed minimum wage, while 2.76 million were living on pay lower than the subsistence minimum for able-bodied people.[7]

This is confirmed by figures from the Ukrainian State Committee of Statistics:[8]

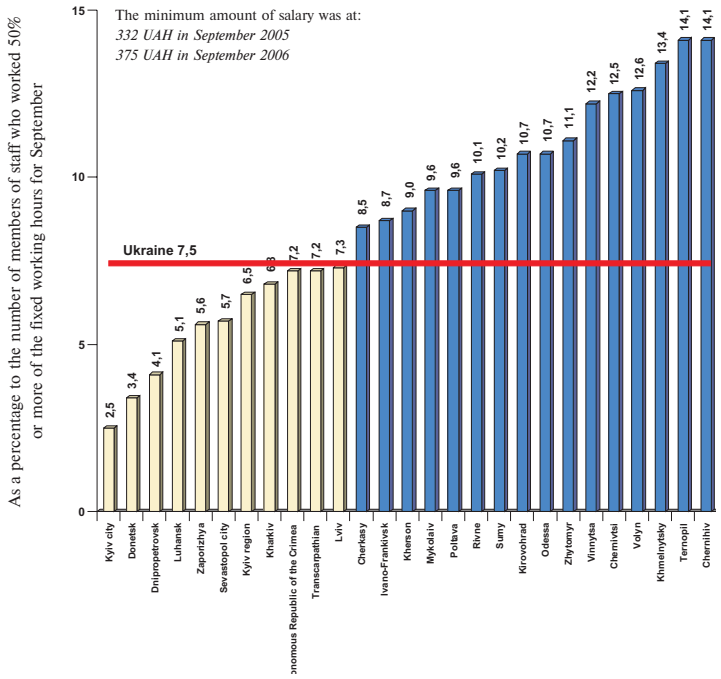
Table 1.

Number of workers paid wages lower than the subsistence minimum for an able-bodied person (for September)

(%)

	2005	2006
Ukraine	**11.2**	**5.4**
AR Crimea region	11.4	5.4
Vinnytsa region	18.6	8.9
Volyn region	14.4	7.2
Dnipropetrovsk region	5.7	2.6
Donetsk region	6.6	2.8
Zhytomyr region	20.1	9.3
Transcarpathian region	7.8	5.8
Zaporizhye region	7.6	4.2
Ivano-Frankivsk region	10.0	5.5
Kyiv region	9.8	5.4
Kirovohrad region	18.0	7.9
Luhansk region	6.1	2.9
Lviv region	11.9	4.3
Mykolaiv region	17.4	8.7
Odessa region	17.7	9.7
Poltava region	15.3	8.4
Rivne region	14.5	5.6
Sumy region	13.9	6.7
Ternopil region	22.6	11.5
Kharkiv region	9.2	4.5
Kherson region	16.6	6.5
Khmelnytsky region	21.9	10.1
Cherkasy region	14.2	6.7
Chernivtsi region	14.2	8.2
Chernihiv region	18.2	9.5
the city of Kyiv	3.1	1.7
the city of Sevastopol	7.1	4.0

Number of workers paid wages lower than the subsistence minimum for an able-bodied person (for September 2006)



It can be seen that even figures from State statistics show that on average 7.5% of those working receive pay lower than the legally established minimum wage. If one leaves out Kyiv

[7] Ukraine struggles with poverty among the working population. According to information from Liga-inform www.liga.net

[8] Figures from the State Committee of Statistics .www.ukrstat.gov.ua

city, then this figure will be higher than 10%, and in many western regions of Ukraine it reaches 13-14 %.

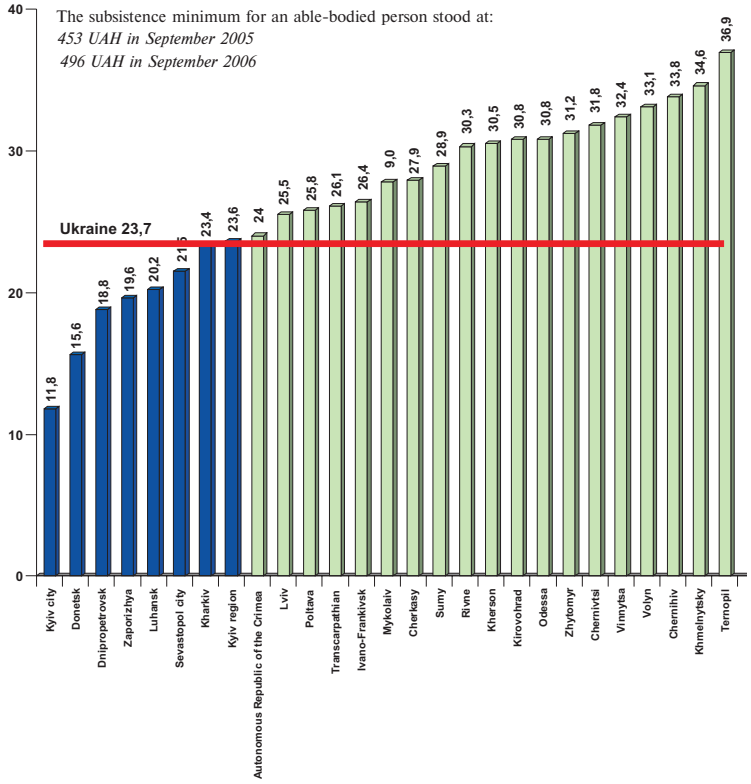
Table 2.

Number of workers paid wages lower than the subsistence minimum for an able-bodied person (for September 2006)

(%)

	As a percentage to the number of members of staff who worked 50% or more of the fixed working hours for September	
	2005	2006
Ukraine	**32,3**	**23,7**
AR Crimea region	32,9	24,0
Vinnytsa region	42,6	32,4
Volyn region	43,8	33,1
Dnipropetrovsk region	24,8	18,8
Donetsk region	22,6	15,6
Zhytomyr region	42,7	31,2
Transcarpathian region	35,4	26,4
Zaporizhye region	32,7	23,6
Ivano-Frankivsk region	35,1	26,4
Kyiv region	32,7	23,6
Kirovohrad region	41,2	30,8
Luhansk region	28,3	20,2
Lviv region	34,9	25,2
Mykolaiv region	37,0	27,8
Odessa region	39,8	30,8
Poltava region	34,9	25,2
Rivne region	40,6	30,3
Sumy region	38,2	28,9
Ternopil region	46,7	36,9
Kharkiv region	30,6	23,4
Kherson region	41,6	30,5
Khmelnytsky region	46,2	34,6
Cherkasy region	38,0	27,9
Chernivtsi region	43,2	31,8
Chernihiv region	44,3	33,8
the city of Kyiv	17,2	11,8
the city of Sevastopol	29,4	21,5

Number of workers paid wages lower than the subsistence minimum for an able-bodied person (for September 2006)



These indicators clearly highlight the full extent of the failure to safeguard people's right to a decent standard of living. 23.7% of the population (which is nearly a quarter) receive wages lower than the subsistence minimum. Only in 5 – 7 regions is the situation somewhat better, while in the others it is considerably more serious. For example, in the Ternopil region the number of workers who earned less than the subsistence minimum came to almost 37%. This, then, is the standard of living in Ukraine at the present time when even people working not only do not receive the official minimum wage, but cannot ensure a basic subsistence minimum.

Despite these figures, the end of 2006 was marked by the tabling, discussion and passing of a Budget for 2007 which did not allow for an increase in real minimum social standards. The Budget approved, for example, a subsistence minimum for people unable to work, form 1 January 2007 of 380 UAH, from 1 April 2007 – 387 UAH, and from 1 October 2007 – 395 UAH. At the same time, according to preliminary calculations from the President's Secretariat, the subsistence minimum for that social group as of 1 October 2006 stood at 381 UAH, on 1 November – almost 391 UAH, and the predicted figure for 1 January 2007 was 406.6 UAH.[9]

It is important also to bear in mind that according to the Law «On Mandatory State Pension Insurance», the minimum size of an age-related pension for people unable to work is fixed as the subsistence minimum for people who have become unable to work. The amount fixed

[9] Suggestions from the President of Ukraine with regard to the draft Law «On the State Budget of Ukraine for 2007». www.president.gov.ua

from 1 January 2007 for the subsistence minimum for people who have become unable to work will accordingly lead to each pensioner allocated the minimum pension not receiving at least 20.6 UAH. It should be mentioned that the pensions of almost 12 million pensioners depend upon the subsistence minimum for people who have become unable to work. This figure determines both the size of State social assistance for vulnerable groups in society (assistance to people who have been disabled since childhood, children with disabilities, help for looking after a children, assistance to single mothers, help for children under a guardian or being cared for, assistance with burial costs, etc).

Another aspect of the 2007 Budget which provoked public criticism was the size of the minimum wage. This was approved from 1 January 2007 at 400 UAH per month, from 1 July 2007 – 420 UAH, and from 1 December 2007 – 480 UAH. If in 2005 there was a 40% increase in the minimum wage, and in 2006 – a 20% rise, in 2007 this was planned at being only 12.5% This sharp slowdown in the rate of growth of the minimum wage will have an adverse effect on the conditions of pay for workers at an absolute majority of businesses in Ukraine since the pay rates of their workers are, in accordance with industrial agreements and collective contracts fixed in relation to the size of the minimum wage.

Bearing in mind the predicted level of inflation in 2007 (according to independent Ukrainian and international experts, this will be around 11%), as well as the rising income tax burden for individuals, it would be fair to say that for the first time in recent years, there has been an actual fall in the real minimum wage. The latter is used for calculating the salary of approximately 10 million people in Ukraine, for example, State Sector workers, including doctors, teachers, scientists and employees in the cultural sphere.

The consideration and approval of such a Budget aroused a wave of indignation among ordinary members of the public. For example, in October 2006 pensioners launched a protest against the restriction in social parts of the Budget. They made an appeal calling for «a suspension of the actions of the Government aimed from 1 January 2007 at eliminating the pension services of the Ministry of Internal Affairs and other «enforcement structures» and transferring their functions to the Pension Fund.»[10]

After the public became actively involved, and following lengthy consultations with the President, the Verkhovna Rada passed a Resolution «On reviewing the subsistence minimum and size of the minimum wage in 2007» which slightly increased social standards. The President in turn signed the Law «On the State Budget fir 2997». It must, however, be noted that the increase in such indicators envisaged in the Resolution is contingent upon the results of the planned revenue or of preliminary calculations of GNP, and may, consequently, not happen.

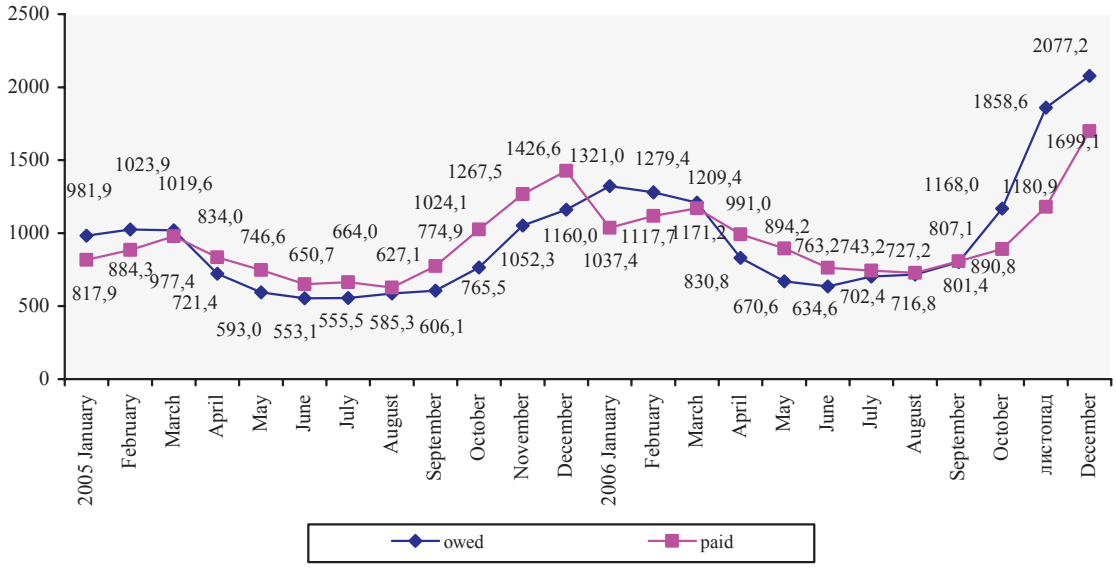
In determining how the right to an adequate standard of living is observed, another aspect must receive consideration. 2006 was marked by a wave of increases in tariffs for housing and communal services, this leading to a further drop in people's standard of living. The average housing and communal charges for each individual had risen in December 2006 by 76% from the same period a year earlier. Together with electricity (based on a calculation of 100 Kilowatt p//h), these charges came to 277.64 UAH which is 21.7% of an average monthly salary (against 15.5% in December 2005). The highest average housing and communal services were in the Dnipropetrovsk, Volyn, Vinnytsa and Chernihiv regions (32.9 – 30.0% of the average monthly wage)[11]

The inability of the population to pay the increased rates for housing and communal charges is confirmed by the increase in arrears. These had increased in December 2006 by 5.2% and on 10 January 2007 stood at 7,177.7 million UAH. On average people were 6.5 months in arrears with their payments. During the year, these arrears increased in all regions, with the most significant rises being observed in the Kyiv, Chernihiv, Odessa, Rivne, Khmelnytsky, Chernivtsi, Volyn, Zhytomyr and Cherkasy regions (33.5 – 24.0%)

[10] Pensioners «rage» outside parliament, available at the UHHRU site: www.helsinki.org.ua/index.php?id= 1161186911
[11] Data from the State Committee of Statistics www.ukrstat.gov.ua/

Table 3. The situation with payment of housing and communal charges[12]

(in millions of UAH)



We would note that instead of taking the high level of poverty in Ukraine into account and bringing in economically justified housing and communal charges, these were not established in a transparent manner and the quality of the services in many cities fails to meet any recognized standards. Especially worthy of note is the rise in public activity against unwarranted rises in tariffs throughout the country. Even Deputy Prime Minister V. Rybak was forced to acknowledge that not all regions had established economically justified tariffs[13] In addition, the Deputy Prosecutor General, T. Kornyakova stated that housing and communal charges had been increased without justification and with infringements of legislation. She cited a number of examples involving the addition to the charges of expenses not foreseen by legislation. The Uzhhorod water and sanitation enterprise had, for example, added a charge for their representative services, although what such services entailed was unclear. In the Odessa region a charge had been added for enterprises' hopeless debt, while in the Zaporizhya region there was a charge for the repair of cars not on the balance books of the housing and communal authority. In Kirovohrad region the hiring of a car for a private businessperson at a cost of 5 thousand UAH per month had been placed among housing and communal services, The water and sanitation authority in the city of Chernivtsi had decided to improve social and cultural provisions at the residents' expense, with 0.5 million UAH added to the tariffs for this purpose. Furthermore, despite the fact that the Cabinet of Ministers had allocated grants from the State Budget to repay debts from previous years of communal service enterprises, the latter were continuing to add this indebtedness to the calculations for housing and communal charges.[14]

In many regions (cities) campaigns have been launched calling for a reduction in the unjustified tariffs and it should be noted that in some cities this has had a positive impact. For example, in Kyiv after the authorities decided to impose what were probably the highest tariffs for housing and communal serives in the whole country without providing any grounds, the public came out in protest, and as a result the tariffs were virtually halved.

[12] Data from the State Committee of Statistics www.ukrstat.gov.ua/
[13] Deputy Prime Minister V. Rybak is dissatisfied with the way communal charges are being established // Dzerkalo tyzhnya № 43 (622) from 11-17 November 2006 року www.zerkalo-nedeli.com/ie/show/622/55044/
[14] Ukrainians are having to pay unjustified housing and communal charges // Ligabusinessinfo: http://news.liga.net/news/N0706956.html

2. THE RIGHT TO SOCIAL PROTECTION

With the transformation to market conditions where people decide themselves what kind of economic activities to undertake and in the main are personally responsible for their material well-being, social protection of the population takes on a particular importance, While the State's role has changed given the new circumstances, one of its main functions remains that of ensuring social protection. The aim here should be to create a system which guarantees each citizen a level of social security in keeping with his or her labour contribution to his/her personal welfare.

The right to social defence involves ensuring a certain subsistence minimum. A system of social welfare must, however, avoid wage-levelling and encouraging dependence in the division and enjoyment of benefits and must heighten motivation to work, creating the conditions for people to most fully achieve their potential.

The system of social protection we have at present in Ukraine cannot boast of any great achievements with regard to the above-mentioned aims. In many cases, its failings are leading to a deepening of the social disproportion within the country. The scale of social assistance is also inadequate especially in the light of the figures for typical incomes given above. According to figures from the Ministry of Employment and Social Policy,[15] at the end of 2005 377.3 thousand low-income families were receiving social aid. In 2005 this aid totalled 1,029.9 million UAH, while the average monthly payment came to 171.47 UAH. 1,091, thousand people were receiving assistance for families with children, and the overall amount for such assistance in 2005 came to 1,686,1 million UAH.

An example of the shortcomings of the system of social protect can be seen in the way subsidies are provided. These are a form of State aid to named families for the payment of housing and communal services, purchase of liquefied gas, hard or liquid burner fuel[16]

At a time when in effectively all regions of Ukraine the price of housing and communal services has risen, the very existence of such a system should guarantee those on low incomes with social protection and the possibility of paying out no more than 15 – 20 % of their income. It must however be said that the State has not ensured the necessary protection for poor Ukrainians since the system for social subsidies is not transparent, clear or comprehensible to the average members of the public and the procedure for receiving subsidies is humiliating. As a result of this, thousands of people who are entitled to subsidies on the basis of their actual income do not receive them.

In connection with this, the Ukrainian Helsinki Human Rights Union addressed an appeal to the Government and the Verkhovna Rada in which it pointed to the problems in raising housing and communal charges and the ineffectiveness of the existing system of subsidies[17]

The appeal states that the system of subsides is lacking in transparency and is not understood by Ukrainians for the following reasons:

- There are at least 77 legal acts regulating these subsidies, while the given procedure is not regulated by any law, but merely by Resolutions of the Cabinet of Ministers of Ukraine and other subordinate legislation;
- Legislation fails to provide clear and understandable criteria for receiving subsidies;
- As a result of the previous points, the average Ukrainian does not understand his / her rights and has no idea whether s/he is entitled to subsidies.

It was pointed out also that the procedure for obtaining subsidies is degrading, with people being asked for vast numbers of documents which they spend hours in queues to receive. The situation is exacerbated by the fact that one needs to go through all this procedure to get the subsidies each year which could be prevented by introducing a system whereby people must inform the authorities of any changes in their circumstances. In addition, there are indeed thousands of people who are entitled, on the basis of their level of income, to subsidies, but are deprived of the possibility of

[15] Letter No. 2 100/016/123-06 from 04.09.06

[16] Resolution of the Cabinet of Ministers No 89 from 04.02.1995 «On providing the population with subsidies to compensate payments for housing and communal services». http://portal.rada.gov.ua/

[17] Appeal from the Ukrainian Helsinki Human Rights Union concerning Reform of the System of Social Subsidies http://www.helsinki.org.ua/en/index.php?id=1164810201

enjoying this right due to normative limitations which do not take account of the objective circumstances of their life.

It should be mentioned that in response to this appeal the Cabinet of Ministers introduced some changes to facilitate the provision of subsidies to those on low incomes, pensioners and others. For example, on 12 December 2006 the Government passed a Resolution «On simplifying the procedure for providing subsidies to compensate payments for housing and communal services for the payment of housing and communal services, purchase of liquefied gas, hard or liquid burner fuel». This allows for a reduction in the number of documents which must be provided in order to be awarded subsidies; an extension to the time period for submitting documents under conditions where the prices and tariffs for housing and communal services are being increased; the allocation of subsidies where there are arrears on housing and communal charges as well as milder fines where a person has submitted documents with incorrect information.

The issue of social security must also be addressed. The right to such protection is guaranteed by the Constitution in Article 46 which states that «This right is guaranteed by general mandatory state social insurance on account of the insurance payments of citizens, enterprises, institutions and organisations, and also from budgetary and other sources of social security; by the establishment of a network of State, communal and private institutions to care for persons unable to work.» It also stipulates that pensions «shall ensure a standard of living not lower than the legally established subsistence minimum.»[18]

The European Social Charter could play an important role in guaranteeing social protection. This states that «With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular

a) to enable elderly persons to remain full members of society for as long as possible, by means of: adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;

b) at provision of information about services and facilities available for elderly persons and their opportunities to make use of them[19].

At the same time, work is still continuing in Ukraine on refining the pension system. This includes work on introducing a cumulative level of mandatory state social insurance and on optimizing the mechanisms for paying out pensions for work in dangerous conditions. As a result of the reform, the social insurance system in Ukraine will have three levels. At the first – solidarity – level, all people working pay compulsory contributions. These are used for payments to pensioners and entitle workers to themselves receive a pension on retirement. The third level involves individuals in a system of private pension care by entering into the relevant agreements with non-State pension funds. The first and third levels are already functioning in Ukraine however the second – accumulation – level has yet to be introduced. This, for example, allows for insurance contributions made to the Pension Fund to be divided. The larger part will continue to be added to the solidarity pension system; however the smaller part, which will from a legal point of view be considered the worker's personal property, will be added to an Accumulation Fund. This will be invested in the economy and the profits gained will also be deemed the worker's property. From the money gathered throughout their working life in the Accumulation Fund, individuals will receive payments which will form a supplementary pension. If the person dies, the money in the Fund will go to his or her heir[20]

It should be noted that in every country, pension reform is planned over 40-50 years and calculated for a full 75. Ukraine's pension laws which got through parliament only after enormous difficulty in June 2003 are also calculated over an extremely long period. They combine international experience adapted for Ukrainian conditions, and domestic elements. However, this has proved easy only on paper. Even before the official start in January 2004, the strategy plan had begun to collapse, and after some dubious actions from the executive, and later the legislative branch of power, the re-

[18] Is the right to social security guaranteed? http://www.helsinki.org.ua/index.php?id=1152524462
[19] Article 23 of the European Social Charter (revised).
[20] Information from the Ukrainian National Information Agency «Ukrinform»: http://pension.ukrinform.com.ua/news-november-06.html

forms stopped completely. This was seen, for example, in a move away from the insurance principles for building a solidarity system. An increase in pensions to the minimum subsistence minimum not from the State Budget, but using money from the Pension Fund has led to problems arising in their differentiation since it could take ten or more years for this pension to be renewed within the solidarity system. Since in the next five – six years women are not going to extend beyond the minimum pension, and if all, regardless of how long they have worked or their salary, are left «on the minimum», then the insurance principles are not working. For men the situation is slightly better with the differentiation between pensions already beginning to slowly be restored. However this will only reach the main bulk of pensioners in six or seven years. Therefore the only possibility for accelerating this process is to launch the second level, i.e. a mandatory accumulation system.

Problems arise here, however, as well. The introduction of a second stage of pension reform had been planned for 2007, but at present a later period is being considered due to the financial instability of the Pension Fund, a slowdown in economic growth in Ukraine, as well as to a certain lack of technical readiness. However the longer the launching of a mandatory accumulation system is delayed, the more this will cost the country. It will lengthen the transitional period when, because some of the money is being channelled towards accumulation, the Pension Fund receives less money while a considerable number of people continue receiving a pension only via the solidarity system and this will cost the country dear.[21]

The Accumulation Fund will be formed from money which has up till now been going into the solidarity pension system, and with the creation of the Fund it will lose a certain amount of income. It is therefore vital that the sources and mechanisms for compensating these losses are specified so that future pensioners do not establish their payments at the expense of today's pensioners. Optimum insurance contributions to the Accumulation Fund also need to be established. The size of the contributions needs to be fairly high so that the Accumulation Fund provides a significant addition to the pension from the solidarity system. And since it is to be paid from a worker's pay, this will also need to be increased. Here there could be problems with State sector workers in whose case it is not clear whether they can count on the possibilities of the State Treasury. Other workers will also be relying on employers who must increase the fund for wages. Overall, what is involved is the need to allow for the redistribution of insurance contributions between employers and those insured, taking into consideration the payments of insurance contributions by the employees to the Accumulation Fund. The demographic situation in the country is developing in such a way that soon one worker will through his or her contributions be paying for one pensioner (it is predicted that in 2010 the load on one worker will be 0.9 pensioners, and by 2015 0.93 already. The Accumulation system must therefore be introduced before 1 January 2009.

There is also a certain problem in the difference between the retirement ages for men and women. The average life expectancy of a woman who has reached retirement age is 23 years. That means that she will live on the pension as many years as she worked to receive it. While a woman is bringing up a child up to the age of three, her contributions to the Pension Fund are made for her, calculated on the basis of the minimum wage. However during other years of her working life, the average pay of a Ukrainian woman does not exceed 70% of her male counterpart. This is not discrimination since one cannot say that in the same position a woman in our country receives less than a man. It is simply that women hold different positions. An average salary which is 70% of that for men is a good European indicator, and in the next decade it is unlikely to become higher, or if so, only rising to 71%. The conclusion from this, given the shorter period for accumulating pension contributions and the significantly longer period during which they receive a pension, is that women's pensions, especially taking into account the future mandatory accumulation system, will be 50% of that for men. A woman cannot accumulate more, however certain benefits regarding consideration of insurance length of payments or of salary could be taken into consideration. Yet this is not a solution. If the likely duration of life after retirement and, accordingly, the actuary calculations on, for example the monthly payments from the accumulation system are calculated using differentials for men and women, there will be completely

[21] Ella Libanova: «A woman has less labour rights because of the low retirement age and pay lower than that for men» // Dzerkalo tyzhnya № 22 (601) 10-16 June 2006. http://www.zn.kiev.ua/ie/show/601/53616/

disaster with the pension coming to 30% of a man's pension. This would represent a violation of women's pension rights[22]

Reform of social protection is vital for Ukraine. One of the directions of such reform is the introduction of a single social contribution with this going back a long way. In autumn 2002 the first draft law «On a single social tax» was prepared and tabled for consideration by the Verkhovna Rada. The motives behind this draft law remain relevant today also, namely to bring business and accordingly wages, out of the shadow economy and make them more transparent. The draft law did not get through, yet within literally a few months a new draft law «On a single social contribution» had been tabled, and the following year – «On a single social contribution and the administration and book-keeping for a single social contribution «. However neither these documents nor those that followed on the same issue elicited much interest from parliamentarians.

.In 2006 a huge number of draft laws on this subject were tabled in the Verkhovna Rada. One can highlight here the draft law submitted by Deputies from «Nasha Ukraina» [«Our Ukraine»] (S. Bychkov and V. Sretovych) «On a single social contribution». This envisages the consolidation within one body which would carry out all the functions of social funds: collecting money; maintaining a database about contributors; controlling levying of payments. It suggests fixing the rate for this single social tax at 20% of wages[23] Bychkov and Sretovych's initiative was not alone. In June the Verkhovna Rada registered an analogous draft law on introducing a single social contribution from Vitaly Khomutynnik and Ludmila Kyrychenko, and then in October by Viacheslav Bohuslayev and Yaroslav Sukhy [all four represent the Party of the Regions).

Then in December a draft law from the Government «On a single system for collecting and book-keeping of contributions for mandatory State social insurance». This draft law, like its predecessors, envisages instead of four addresses (the Pension Fund, the Unemployment insurance Fund, the Industrial Accident and Occupational Diseases which have caused Disability Fund; and the Social Insurance Fund for Temporary Disability) single deductions from wages for social purposes, and then the State will distribute money to all the necessary social funds. It is envisaged that the book-keeping on money for the social protection of the population will be better, and the authors of the draft law therefore think that the State will be able to control and manage this capital more efficiently. The reform should, in addition, help to reduce the shadow pay sector. To achieve this, it is envisaged that the size of the single social contribution will be reduced in comparison with present social security deductions. The creation is also planned of a State register of social insurance which would contain information about payers of a single social contribution and a registered of those insured in the form of electronic documents confirmed by electronic signatures. Should this draft law be passed, the plan is to create an accumulation system for pensions and social payments which will be calculated taking into consideration data from the single electronic base.[24]

We should mention that this draft law also envisages the distribution of expenditure on social insurance between the employer and the worker, with the former's share being reduced and the employee's increased. Some authors even propose dividing the contributions equally between them, arguing that in this case the worker will have more control over the efficient use of the money being paid for social insurance. However on the example of the profit tax from individuals which is paid directly by hired workers, we can see that as a result of this control from the workers' side over the efficient use of the contributions made is far from high.

It is worth also pointing out the negative experience of the Russian Federation where a single social tax has been applied since 1999, with the tax not having achieved the expected results or the objectives for which it was created. The reduction in the social burden on employers (from 36% to 26%) did not prove an incentive to legalize salaries. The financial resources of the funds are drained,

[22] Ella Libanova: «A woman has less labour rights because of the low retirement age and pay lower than that for men» // Dzerkalo tyzhnya № 22 (601) 10-16 June 2006 www.zn.kiev.ua/ie/show/601/53616/

[23] Bychkov and Sretovych propose a single social contribution // Ekonomicheskiye izvestia www.rynok.biz/news/government/3840

[24] M. Semenchenko: The no-win social soap opera. A single contribution will make it possible to reduce the tax load (Draft law «On a single system for collecting and book-keeping of contributions for mandatory State social insurance», prepared by the Ministry of Employment and Social Policy) // Den. – 2006, 25 October – p. 5.

and funds are being channelled into it from the Federal Budget. In contrast to Russia, we cannot count on our Budget either in the near future, or in the longer term.

The problem is also exacerbated by the inefficiency of the existing social funds.

For example, the Ukrainian Accounting Chamber noted in its report that money in the compulsory Unemployment Insurance Fund in 2005 and the first half of 2006, in certain areas, had not been managed efficiently, this having a negative impact on the socially important issue of guaranteeing employment. Work placement for the unemployed through providing subsidies to employees had, in the main, involved badly-paid jobs which did not encourage people to remain at an enterprise (during 2005 almost every fifth person in such subsidized positions resigned). According to the Accounting Chamber's information, vocational training for people unemployed was largely given without specific requests from particular employers. Regional and base employment centres ran vocational training for jobs which were not sufficiently in demand on the labour market to ensure that people would find appropriate jobs. Vocational training for the unemployed did not always comply with the indicators for the regional employment programmes.

It was also established that legislative lack of clarity regarding the types of social, information and consultative services linked with finding people jobs, and the procedure for providing such services led to 6,437 thousand UAH from money allocating on social services being spent on things not directly linked with providing services to the unemployed. The Accounting Chamber drew attention to the fact that temporarily available money from the Fund had been managed inefficiently and with failure to comply with the Resolution of the Cabinet of Ministers No. 111 from 22.01.2003 regarding the procedure for placing reserves and temporarily available money. The Fund's board had not adhered to Article 16 § 4 of the Fundamental Law and the above-mentioned Resolution with this resulting in the executive directorate being given the right to contract agreements with the bank and Fund without agreeing this with the board.

The Accounting Chamber also commented upon problems with the work of the Social Security Fund for Industrial accidents and occupational diseases leading to disability. For example, the audit showed that due to the lack of agreed activities of the parties to the social partnership, there were gaps in the normative legal regulation of issues over filling the budget of the Fund as well as managing and using money. Mention was also made of the unsatisfactory state of industrial safety and the work environment at enterprises; the inadequate implementation of industrial safety measures; the failure to introduce already completed scientific measures for preventing accidents into the workplace; the fact that none of the programmes for improving industrial safety, working conditions and the work environment had been carried out on time. This had had a negative impact on social protection, as well as in the enterprises' interest in improving industrial safety.[25]

3. RECOMMENDATIONS

Ukraine must overcome serious problems, including the lack of individually directed social assistance, the use of insurance funds not as intended, economic distortions, excessive costs of the system of social security. In order to resolve these problems, one can only agree with the following recommendations from international experts:

1. Tailor social commitments to available resources, this meaning that any increase in social transfers which cannot be financed should be prohibited. The State should also refrain from creating new benefit categories, and benefits which are designed as compensation for damages incurred need to directly depend on the nature of the injuries and their reasons;

2. Concentrate on reducing poverty, with a system of social protection being created to achieve this end;

[25] The Committee on Social Police and Labour has received information from the Accounting Chamber of Ukraine on the results of an audit into the forming and implementing in 2005 of the budget of the Social Security Fund for Industrial Actions and Occupational Diseases www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=840322&cat_id=445

3. Improve benefit targeting. This is needed to ensure that social protection funds actually reach the poor. To achieve this new methods are needed for evaluating the level of poverty, together with poverty mapping;

4. Reduce the number of benefits and monetize them, with this increasing the level of transparency and responsibility;

5. Clearly delineate social protection and social insurance. Under insurance programmes there must be a clear link between the size of the premiums paid and the level of compensation which the beneficiary receives. This will promote an increase in the level of legal employment since the size of the payments will be linked with the period and overall amount of contributions. All insured individuals will have to make contributions to all mandatory State insurance funds, with any exceptions needing to be financed from the State Budget, and nor from insurance funds. Only those citizens who have paid all the necessary premiums will be able to receive accident compensation. Similarly insurance funds should stop funding unrelated benefits;

6. Focus on economic growth, investment and job creation[26]

We would add the following recommendations:

1) Ensure implementation of the Strategy for poverty elimination, promote an important in material well-being, as well as ensuring a proper level of pay in all areas of the economy, no lower than the minimum level so ensure that even the poorest members of society have a decent standard of living;

2) Promote further increase in the real minimum wage and accordingly other social payments, but not through increasing the State deficit, but by making efficient use of economic growth;

3) Take a balanced approach in forming tariffs for housing and community services, ensure a transparent and open method for calculating such tariffs, prevent unwarranted increases in tariffs and actively respond to infringements;

4) Create an effective, simple and transparent system of subsidies as an important element of social protection of the population;

5) Continue reform of the pension system, begin introducing a second (accumulation) level of this system, giving detailed consideration to the financial aspects involved;

6) Carry out measures to introduce a single social payment in order to improve the targeting of social assistance, to prevent non-targeted use of insurance funds, as well as to gradually rectify economic distortions;

7) Achieve growth in a part of the payment for work in the production price, thus increasing the value of labour, and accordingly ensuring the right of citizens to a decent living wage.

[26] «The State and the Citizens: Delivering on Promises:, 2006 Report of the Blue Ribbon Commission

XV. SOME ASPECTS OF LABOUR RIGHTS[1]

Among the most pressing problems in Ukraine with the right to work are owed wages, unemployment and remuneration for people's work.

An analysis of court practice and of the issues which most often lead to labour disputes highlights a range of other problems which need to be resolved. These include breaches of work contracts or other agreements, primary trade union organizations not being allowing to take part in collective bargaining and to conclude collective agreements, late payment of wages or final settlement when leaving a job, wrongful dismissal, as well as non-payment of compensation for unused leave.

1. THE RIGHT TO FAIR REMUNERATION

The artificially reduced cost of labour in Ukraine is a legacy of the Soviet planned economy with its low wages. In Soviet times, however, this was compensated for by the wide scope of consumption areas which were distributed via the so-called social consumption funds, via subsidies on housing and communal, sanatorium and resort services, a large number of consumer items, free medical care and education. The low wages were accompanied by just as low, strictly regulated, prices on goods and services.

The move to a market economy destroyed the system of subsidies and, to a large extent, the social consumption funds. However the wish to restrain competition on the world market in conditions of high consumption of energy and materials has led to the retention of low wages. This is at present an important factor for the competitiveness of Ukrainian goods. However it's impossible not to notice that the low cost of labour is to an even greater extent an insurmountable barrier against increasing productivity of labour and leads to an exodus of the most active layers of society abroad. High social transfers are not possible without proper wages. This means that wages being at a low level is a poverty factor not only for the working population, but for those in society unable to work. All of this is restraining the development of the domestic market. Under the present process of integration we will not be able to gain a qualified labour force within the country without radically increasing wages which should become the main motivating force for labour.

The lack of alternative to rejecting a destructive model of competitiveness based on a cheap labour force is also linked with the fact that cheap labour can only be used in conditions of deep crisis and at the initial stages of the formation of a market economy. Later it is without prospects and almost no country has achieved serious success and increase in the nation's prosperity through using it.

The divide according to these parameters between countries which use «cheap» or «expense» labour is only widening. Without questioning the need to synchronize an increase in wages with the rate of growth in labour productivity, one should note that this criterion cannot nonetheless be used blindly. Already seriously behind Central and Eastern European countries in terms of GNP per worker (labour productivity), we are lagging still further in level of wages.

[1] Prepared by Maxim Shcherbatyuk, UHHRU

This means that the indicator which in Soviet times was deemed the level of exploitation of hired workers, in today's Ukraine is much higher than all its neighbours, except maybe Bulgaria.

Specialists estimate that wages, even taking into account social deductions into the remuneration fund stand at a little more than 8% of the value of domestic products. An increase in wages by 30% will only help increase this figure by 2%. Thus, even if wages were to become several times higher, this would not bring about an economic catastrophe.

One can clearly see the problem of cheap labour in the wages paid miners in the East of Ukraine. The Public Committee for the Protection of Constitutional Rights and Civil Liberties, together with the Confederation of Free Trade Unions in the Luhansk region carried out monitoring over adherence to minimum State standards and State guarantees in the mining city of Zorinsk in the Luhansk region (the «Nikanor-Nova» Mine)

Miners' family income

Average statistic indicators for the average wages of miners at the «Nikanor-Nova» Mine in 2006.

The majority of underground workers, not counting engineering – technical personnel, earn monthly wages in UAH of between 2,793 and 1,301. Of the roughly 850 men in this category, 221 received wages of 2,793 UAH and 157 earned 2,165 UAH. Just over 200 men earned 1,736 and 1,974. 188 earned just over 1,300.

Around 300 people were working as loaders; on repair and construction teams or providing electrical and mechanical services, as guards, stokers and others. Their wages were considerably lower with the highest earned by 88 loaders being 957 UAH per month, and the lowest – staff of a kindergarten – 469 UAH.

Table 1.

In total for the mine:	Average wages in UAH
1,212 men were involved in extracting the coal	1640
804 were other workers underground	2064
1,396 counting engineering – technical personnel	1720
123 engineering – technical personnel underground	2244
65 engineering – technical personnel at ground level	912
1625 in total for the mine	1548

Over 500 workers of the mine earn less than 600 UAH. Of these almost none receives State subsidies on communal charges.

Table 2. Miners' outgoings Normative figures for a minimum consumer basket calculated for persons not working (pensioners) in market prices as of 15 January 2007 (Zorinsk)[2]

Commodity	Monthly consumption norm kilo/litre/item	Price in UAH	Cost of the monthly consumption norm per person
Meat and meat products	4,13	35,0	144,55
Milk and milk products	19,41	10,0	194,10
Animal fat	4,23	16,0	67,68

[2] Ibid

Eggs	21,18	0,35	7,41
Fish	1,32	18,0	23,76
Potatoes	7,49	2,80	20,97
Vegetables	8,84	8,35	73,81
Fruit and berries	5,04	7,38	37,20
Bread	7,79	2,5	19,48
Vegetable oil	0,62	6,0	3,72
Sugar	2,35	3,3	7,76
In total:			600,44

Table 3. Calculated figures for the energy consumption (in calories) according to types of work in market prices at 15 January 2007 (Zorinsk)[3]

Type of work	Energy requirements in kilocalories	Cost of monthly consumption in UAH
Pensioners not working	1900	600,44
People engaged in mental work	2800	884,86
Light physical labour	3000	948,06
Medium physical labour	3200	1011,27
Particularly hard physical labour	3700	1169,28
Full-time work underground in Donbas conditions	4300	1358,89

If one takes a three-person mining family: husband, wife and child or teenager, then simply on proper nourishment adequate for reproductive purposes, the following amounts per month (in rounded figures) would be needed*[4]:

Husband	1360
Wife	950
Child / teenager	1140*
In total:	3450

Keeping to the proportions of basic outgoings, as defined in the method handbook, we can say that the cost of non-food items for a family (on average, bearing in mind yearly seasonal expenses on clothes, footwear, repairs to the flat, linen, crockery, furniture, toiletries etc) come to 3450, divided by 3 being 1,150 UAH per member of the family.

The cost of housing and communal services for a family living in a two-room flat with an electric cooker (using the new tariffs) consists of the following: heating – 240 UAH; rent: 60 UAH; cold water and drainage – 35 UAH; hot water – 30 UAH; electricity – 50 UAH.5 Total outgoings on housing and communal services thus come to 415 UAH.

Overall then, the outgoings for a family of three can be broken down as follows:

– food – 3450 UAH.

– other commodities – 1150 UAH

[3] Ibid

* According to the method handbook on calculating the subsistence minimum issued by the Ministry of Labour from 17.05.2000 № 109/95/157, the cost of the consumer basket for a teenager is 1.2 times higher than average.

[5] Outgoings on communal services are taken in the optimum case where there is central heating, hot and cold water (as in Luhansk). For Zorinsk, taking into consideration the local infrastructure, housing and communal services structure, the outgoings of residents of apartment blocks are actually higher. This is especially true if one takes into account moral damages, which can be partially seen through the «above-norm» spending on medical treatment due to catarrhal illnesses, extra spending on transport, food, etc.

– housing and communal services – 415 UAH.

Altogether the family spending comes to 5,015 UAH.

If the miner's wife also works, which is unlikely in Zorinsk, she receives around 650 UAH.

This brings the total income with 1550 + 650 to 2200 UAH.

Shortfall in the family budget – 2,815 UAH.

The figures here give grounds for asserting that the income of a miner from Zorinsk not only fails to provide for his family, but cannot even guarantee him the minimum subsistence level – the full amount of calories required, payment for communal services, for heating his home, electricity, water, gas, sanitation, rent, and basic necessities.

One should note that overall the actual tariffs in coal enterprises in the Luhansk region on the basis of which the real wages fund is formed are much lower than those established by law. In addition, discriminatory practice was also identified (as the «creative input» of local «coal barons») when at one and the same mine a higher tariff (although lower than that fixed by law) is set only for the main workers (drillers and tunnel diggers) as a special privilege.

«The State-guaranteed», i.e. legally established tariff (minimum wages) for first category workers in the coalmining industry over the last two years were:

from 01.01.05 - 262 UAH

from 01.04.05 – 290 UAH.

from 01.07.05 – 310 UAH.

from 01.09.05 – 332 UAH.

from 01.01.06 – 350 UAH.

from 01.07.06 – 375 UAH.

from 01.01.07 – 400 UAH.

from 01.04.07 – 420 UAH

The actual level of tariff rates in the mines is lower than that established by law due to the supposed difficult economic situation of the enterprises. The «official» coalmining union in such cases always takes an obsequious (opportunistic) stand supporting the interests not of the workers, but of the employers who traditionally are supposed to «not have enough» money to pay a decent wage. This is clearly seen in the following table[6]:[7*]

Table 4.

State enterprises	Term for establishing the tariff on the enterprise	Minimum wages	Tariff for main professions	Tariff for other professions
«Sverdlovantratsyt»	01.03.07	400	400(480)*	375
«Luhansk coal»	01.01.07	400	400(480)	290
«Antratsyt»	01.03.07	400	400(480)	290
«Donbasantratsyt»	01.01.07	400	400(480)	290
«Krasnodon coal»	01.02.07	400	400(480)	400
«Rovenkyatratsyt»	01.12.06	375	375(450)	375
«Pervomaisk coal»	01.04.07	400	400(480)	400
«Lysychansk coal»	01.01.07	400	400(480)	290

[6] Monitoring of adherence to minimum State standards and State guarantees in the mining city of Zorinsk in the Luhansk region (the «Nikanor-Nova» Mine). Carried out by the Public Committee for the Protection of Constitutional Rights and Civil Liberties, together with the Confederation of Free Trade Unions in the Luhansk region.

* the figure in brackets is the size of the tariff which should have been imposed taking into consideration the coefficient 1,2 – according to 2.2 of the General Agreement.

At one of the most successful enterprises – the State enterprise «Krasnodonugol» which then became the open joint stock company «Krasnodonvuhillya» [«Krasnodon coal»], an analysis was carried out of how minimum guarantees on wages had been followed since 1999. This confirmed infringements of labour legislation over the entire period from 1999 to 2007.

As a result, workers of all coal mining enterprises do not receive a considerable part of their wages, and accordingly a smaller amount is paid into the Pension fund and the State budget.

In order to resolve this problem, the Independent Trade Union of Miners of the «Nikanor-Nova» Mine registered a labour dispute regarding non-receipt in full of minimum guarantees of remuneration. Labour arbitration took place, with Protocol No. 3 of the arbitration hearing registering the consideration of a collective labour dispute between workers of the «Nikanor-Nova» Mine, the State enterprise «Luhanskvuhillya» [«Luhansk coal»] (Zorinsk) and the General Director of «Luhanskvuhillya» (city of Luhansk) (№ 018-06/12-Y from 04.08.2006.). However there has been no positive judgment.

After numerous appeals from the Independent Trade Union of Miners of the «Nikanor-Nova» Mine and the Confederation of Free Trade Unions to remove this infringement of labour legislation, an agreement was signed on 17 November 2006 between the Ministry of the Coal Industry and the Trade Union of the Coal Industry. This agreement envisages approval of tariff rates and pay calculated on the basis of a minimum wage of 400 UAH, taking into consideration the General and Branch Agreements from 1 June 2007.

This agreement was discriminatory in nature since the plan was to approve tariffs for drillers and tunnel diggers based on calculated on the basis of the minimum wage in stages, beginning from 1 January 2007 up till 1 June 2007, while auxiliary workers were to have the increases of tariffs in stages beginning on 1 April 2007. The Confederation of Free Trade Unions appealed against the agreement as being discriminatory, and in February some workers from «Donbastratsyt», the Izvestia and the Knyahyninsk Mines, under the leadership of independent trade unions held protest strikes underground, refusing to come up to the surface. As a result a decision was taken to approve tariffs and payment to workers of «Donbasantratsyt» from 1 April 2007 on the basis of a minimum wage of 400 UAH, yet once again without using the coefficient of 1,2 foreseen in the General Agreement.[8]

With respect to unemployment in Ukraine, the official statistics of government employment centres tell us that as of 1 January 2007 there were 0.8 million people on their books unemployed and seeking work, of whom more than a third were younger people up to the age of 35. Half of them live in rural areas. Among these people almost half (45.4%) had previously been manual workers, while a quarter (27.0%) held a civil servant position, and almost the same number did not have vocational training (27,6%). 97.3% of those unemployed had received official unemployed status on the date mentioned.[9]

However it is important to note one interesting detail. In employment centres at present there are over 2 million unfilled vacancies, with the real figure even higher, while, as mentioned above, there are more than 800 thousand unemployed. Admittedly, in only 5% of the cases do the vacant positions offer wages of more than one thousand UAH per month, with 70% offering less than 500 UAH., According to the Deputy Director of the Institute of Demography and Social Research Ms Lbianova, «These vacancies will never be filled since people quite justifiably are not going to work for such peanuts. In Ukraine at present we don't have a problem with unemployment in the traditional way this is understood in prosperous countries. The problem of unemployment here is levelled out and turned into absolutely pitiful and degrading earnings»[10] This is backed up by representative of the International Labour Organization V. Kostrytsa who states: «Most newly-created jobs are not high-quality with 60 percent of them offering less than

[8] Ibid
[9] Figures from the State Department of Statistics www.ukrstat.gov.ua/
[10] A. Alekseyev: «How cheap can labour remain?» // Dzerkalo tyzhnya [Weekly Mirror] no. 4 (633) from 3-9 February 2007. http://www.zn.kiev.ua/ie/show/633/55765/

345 UAH a month. By offering unemployed people jobs with low wages, we can't claim to be providing them with worthy employment».[11]

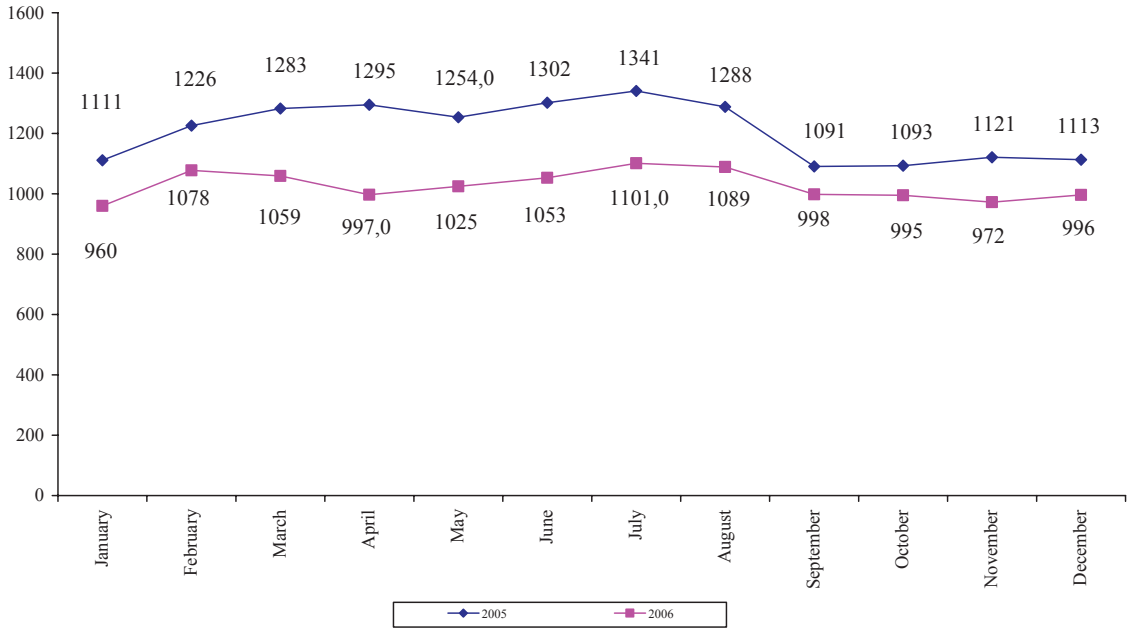
Only in 2002 did the average salary in the country reach the subsistence level for able-bodied individuals, while the minimum wage has still not been able to reach this. As a result there is an incredible situation where the risk of poverty is effectively not dependent on whether or not there are people working in the family. 80% of poor families have at least one person working. Therefore employment is no guarantee against poverty.

The result is obvious: a large part of the population wants to go abroad using any means, and the number of young people with a higher education is falling. In international terms as far as our indicators for education of the population are concerned, we still look respectable enough, however this is only thanks to older age groups. In the employment structures only the percentage of simplest jobs is steadily rising while the percentage of types of qualified work (with the exception perhaps of people in retail, high-level civil servants and managerial levels) is falling inexorably.

The main directions of government impact on the level of wages should lie in increasing the level of State sector workers' pay; introducing a full-scale tariff net (possibly with an extension at the same time of the social package); taking part in social dialogue at the level of negotiations on branch tariff agreements and collective contracts; compensation for employers' spending on targeted training of qualified workers and construction of temporary accommodation.

At the same time, the problem is intensifying of wage indebtedness which has become a chronic malaise in Ukraine. According to figures from the State Committee of Statistics, the amount of wages owed at 1 December 2006 were 3.7%, or 35.8 million UAH, higher than the figures for the beginning of the year, coming to 996.1 million UAH, or 7.7% of the remuneration fund calculated for November 2006 for all employees.

Table 6. Changes in indebtedness against wages in 2005 – 2006
(as of the 1st day of each given month)



[11] «Less and less unemployed in Ukraine, but ever more poor people»: http://www.helsinki.org.ua/index.php?id=1171022400

Pay owed to employees of working enterprises between January and November 2006 increased by 3.9%, or by 15.1 million UAH, and at 1 December stood at 477.2 million UAH, or 47.9% of the entire wages debt. Among the types of economic activity involved, the largest increases in the amount of unpaid wages were seen in the manufacturing industry – by 43.8 million UAH, in organizations carrying out operations with real estate – by 22 million UAH, at machine and equipment plants – by 20 million UAH. From the point of view of regions, a rise in debt at working enterprises was observed in 16 regions, with the highest rates in the Kharkiv region (2.9 times higher), the Ivano-Frankivsk region (2.8 times higher) and in the Transcarpathian region where the figure was up 2.8 times.

Overall, out of each 100 UAH not paid out by working enterprise, 45 were owed employees of industrial enterprises, 12 – by organizations carrying out operations with real estate, another 11 by agricultural enterprises. At the beginning of December 2006, 347.5 people, or 3.1 percent of the total number of workers had not received their pay on time. The amount of debt on average per worker at 1 December 2006 came to 1,099 UAH, which is almost on the level of the average monthly pay for November 2006. An increase by 12.4% in debt owed in unpaid wages during January – November 2006 was also seen at bankrupt enterprises. At enterprises which had suspended production or economic work (economically inactive), a decrease was observed in debt against wages of 19.5%.

Just in Chernihiv region over 9 months of 2006 the regional prosecutor's office launched 48 criminal investigations over infringements of legislation on remuneration. 308 other prosecutor's measures were also taken on these issues. Proceedings were launched against 220 public officials. In civil proceedings 493 claims were lodged with the region's courts to retrieve money owed. Millions of UAH were ordered in compensation. In the same region between January and August 2006 the State Labour Inspectorate checked 7 enterprises owing wages. The debt in unpaid wages at those enterprises came to 171.7 thousand UAH, with the time the money had been owed from between one to ten months. According to the results of the inspection, 7 protocols on administrative offences were drawn up and submitted to the court against the managers of the following: the State enterprises «RESSKIlion», «AhaSna» and «Ahat-mriya», the open joint stock company «Ahat», the agricultural LLC «Poliske, the construction association «Raiaglobud» and others»

In December 2006 teachers from the Kulykivske Secondary School in the Chernihiv region held a protest strike and picket outside the district State administration. They were protesting against the delays in receiving their salary which had begun in 2006. Immediately prior to the action, the teachers had received pay only for September. After the strike they were also paid for October. Nobody could tell them when they would receive their pay for November and December. The teachers were also outraged by the fact that despite this the authorities had found the money to buy flats which were not cheap for some functionaries. In general non-payment of salaries has again raised its head in many districts of the region. As of 13 November the region's teachers were owed 13 million 881 thousand UAH, including 901 thousand in the small Kulykivske district. The local budgets dimply don't have the money, and funding for education was planned only for around three quarterly periods.

In the Ivano-Frankivsk region during 11 months of 2006 the prosecutor's office launched 110 criminal investigations over non-payment of wages, where the debt stood at 9.6 million UAH. Of these 52 investigations were against public officials who were alleged to have deliberately allowed the debt to arise on payments even though there were funds which had been used for other purposes.

The problem with wages owed is particularly acute in mining regions. Late payment of wages and accumulated debt are chronic there with even State controlling agencies acknowledging this. They note that the articles of the Labour Code pertaining to timely payment of wages are constantly being infringed. The following figures from the Luhansk region can serve as confirmation of this.

Table 7. Information on infringements uncovered by the Luhansk region Territorial State Labour Inspectorate of the General Agreement between the Cabinet of Ministers, the All-Ukrainian associations of employers' and business organizations and All-Ukrainian trade unions and trade union associations for 2004-2005 and the Branch Agreement in the Luhansk region as of 01.08.2006.[12]

City / district	Article 95 § 1 of the Code of Labour Laws of Ukraine (CLLU)			General Agreement (remuneration)			Article 97 of the CLLU			Both Article 97 of the CLLU and the General Agreement		
	7 m. 2005	7 m. 2006	difference	7 m. 2005	7 m. 2006	difference	7 m. 2005	7 m. 2006	difference	7 m. 2005	7m. 2006	difference
Antratsytivsky district	2	1	-1			0	1		-1	1	0	-1
Bilovodsky district	14	11	-3	1		-1	22	20	-2	23	20	-3
Bilokurakynsky district	1	0	-1		1	1	2	1	-1	2	2	0
Krasnodonsky district	3	1	-2	3	5	2	2	5	3	5	10	5
Kreminsky district	7	2	-5	8	1	-7	11	4	-7	19	5	-14
Lutyhinsky district	4	2	-2	2	1	-1		1	1	2	2	0
Archevsk	17	10	-7		5	5	19	8	-11	19	13	-6
Antratsyt	3	2	-1	3	1	-2	9	1	-8	12	2	-10
Bryanka	11	11	0	4	6	2	14	8	-6	18	14	-4
Kriovsk	2	1	-1	1		-1	2		-2	3	0	-3
Krasny Luch	1	10	9	3	8	5	14	13	-1	17	21	4
Krasnodon	6	4	-2	7	9	2	3	5	2	10	14	4
Lysychansk	15	2	-13	4	8	4	20	14	-6	24	22	-2
Luhansk	38	33	-5	14	17	3	40	29	-11	54	46	-8
Pervomaisk	10	4	-6		5	5	17	9	-8	17	14	-3
Rovenky	9	1	-8	6	7	1	3		-3	9	7	-2
Rubizhne	1	9	8	8	4	-4		1	1	8	5	-3
Sverdlovsk	5	2	-3		3	3	3	11	8	3	14	11
Severodonetsk	3	5	2	1	1	0	12	11	-1	13	12	-1
Stakhanov	1	3	2	1	4	3	9	11	2	10	15	5
Markivsky district	11	9	-2	2	4	2	10	3	-7	12	7	-5
Novoyaidarsky district	19	8	-11	11	11	0	27	12	-15	38	23	-15
Novopskovsky district	5	4	-1	1	1	0	15	5	-10	16	6	-10
Perevalsky district	1	0	-1	2	4	2	4		-4	6	4	-2
Polasnyansky district	1	0	-1		1	1	1		-1	1	1	0
Svyativsky district	19	4	-15	7	3	-4	24	3	-21	31	6	-25
Slavyanovserbsky district	1	9	8		4	4	3	1	-2	3	5	2
Stanychno-Luhansky district	13	3	-10	1	2	1	12	3	-9	13	5	-8
Starobilsky district	18	8	-10	1	15	14	22	3	-19	23	18	-5
Troitsky district	14	6	-8			0	14	3	-11	14	3	-11
Millovsky district	2	9	7		4	4	2		-2	2	4	2
Total	**257**	**174**	**-83**	**91**	**135**	**44**	**337**	**185**	**-152**	**428**	**320**	**-108**

According to figures from the Ministry and other executive bodies, in the educational institutions under their control the debt against student grants and funding for students, cadets and school stu-

[12] Information from the State Labour Inspectorate for the Luhansk region.

dents rose by 0.2% during November and at 1 December 2006 stood at 858.3 thousand UAH which marks a drop of 5.4%, or 48.8 thousand UAH against the analogous figure for 1 December 2005.

All these indicators demonstrate the severity of the problem as seen also in cases where Ukrainians have filed suits with the courts over wages owed and won them.

An example can be seen in the claim brought by doctors from the Chortkiv Central District Hospital against the hospital administration over non-payment of expenses for work-related trips and specialization courses. A State programme is underway in Ukraine for moving to the model of family medicine .based on the key role of the family doctor – a general practitioner. Despite the fact that the majority of doctors have specifically this qualification – doctor of general practice, for several years now all district doctors have had to go on six-month «retraining» courses to become family doctors. At the same time the programme's implementation is not covered by budgetary funding. The administrations as a rule refuse to pay expenses for the six months spent on the specialization courses, for living in hostels etc.

It was for this reason that seven doctors: T. Kvitko, O. Marushchak, A. Muzyka, Y. Prytula, I. Stepanenko, N. Tsymbala and S. Shulyak lodged a civil claim against the actions of the Chortkiv Central District Hospital. In 2006 they won their case in a first instance court, and then in February 2007 the Ternopil Court of Appeal upheld the initial ruling from the Chortkiv District Court.

Another problem is that there is no proper system of legal regulation for extracting money from the State Budget following decisions by State bodies to pay off indebtedness to employees of State institutions. This indebtedness, the size of which is not legislated, arose as a result of the lack of consistent State policy with regard to payment of wages to employees of State institutions built on the principle of providing different priorities depending on the political situation in the country. In this, neither the real paying capacity of the budgets, nor the fact that current legislation did not envisage a system of registration for such indebtedness and stipulate the sources, time frame and order of their repayment.

These shortcomings, as well as the lack of State reporting and initial registration of rulings on these issues, have led to a loss of control by the government over the transparency of the process of deducting money and varying applications of norms of current legislation. All of this results in unlawful and inefficient spending from the State budget, as well as infringements of constitutional rights and civil liberties. These were the conclusions reached by the Board of the Accounting Chamber based on an audit.[13]

The State budget, as the Accounting Chambers auditors point out, also had extra expenses due to the use of different methods for registering and repaying debt than those foreseen by legislation. For example, in breach of Article 23 of the Budget Code of Ukraine, the Ministry of Defence and the State Department for the Execution of Punishments dealt with their indebtedness for material property when transferring people to the reserves «at their own wish», with compensation payments for non-issued material property not envisaged by budgetary allocations coming to 6.2 million UAH[14].

The State Judicial Administration introduced its own mechanism for repaying indebtedness to judges by approving a separate budgetary programme entitled «Enforcing court rulings for the benefit of judges». This means that with the lack of recognition by the State via legislation of indebtedness in the area of remuneration for work and the lack of a register of such in the State Judicial Administration, the latter was designated as the source for repayment of non-existent budgetary obligations to judges for their rulings. This placed employees of the judiciary in a privileged position against other categories of employees of State sector institutions however it did not fully resolve the problem. Furthermore, the introduction of such a mechanism for paying off indebtedness ran counter to budget legislation, the Law «On enforcement proceedings» and created conditions for the manual control by the State Judicial Administration of the process of designating budgetary allocations for the said purposes. The enforcement of court rulings was carried out by territorial divisions

[13] Discrepancies in legislation – citizens and the Budget lose out – Conclusions from the Ukrainian Accounting Chamber www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=801348&cat_id=411

[14] These are for work expenses, just as uniforms, etc. In fact the money was never paid thus leading to workers' entitlement to compensation [translator]

on the basis of administrative decisions by a central body, these stipulating the specific recipients of funding and the size of the budgetary allocations.[15]

In the course of monitoring labour rights in 2006 cases were also identified of «lawful» violation of the rights of workers to extract wages from enterprises in enforcement of court rulings.

For example, offices of the State Bailiffs' Service suspend enforcement proceedings as regards extracting wages, referring to the norms of the Law «On measures aimed at safeguarding the stable functioning of the fuel and energy industry» from 23.06.05 № 2711-IV.

This is confirmed by the answers from the State Bailiffs' Service office of the Sverdlovsk City Department of Justice in the Luhansk region from 12.04.2007 № 3354, from the SBS of the city of Krasny Luch from 11.08.2006, № 2-11/6387, and from the General Director of the State Enterprise «Dosbasantratsyt» from 27.02.2007 № 1-1/354. The answers state that in accordance with Article 34, item 15 of the Law «On enforcement proceedings», such proceedings shall be suspended in connection with the fact that from 28.11.2005 the State enterprises «Dosbasantratsyt» and «Sverdlovantratsyt» have been included in the register of enterprises of the fuel and energy complex and the participation of the enterprise is confirmed in the procedure for paying off debt in accordance with the Law ««On measures aimed at safeguarding the stable functioning of the fuel and energy industry» from 23.06.2005 № 2711-1V. Cases where enforcement proceedings are suspended are carried out in accordance with decisions of the Krashnodon City District Court.

Human rights organizations believe that the norms of the Law «On measures aimed at safeguarding the stable functioning of the fuel and energy industry» do not give grounds for suspending enforcement proceedings to retrieve wages following court orders since this runs counter to Article 2 § 2 of the Law «On introducing a moratorium on the mandatory sale of property». Nor in their view does the given law apply to debt against wages, since what are referred to here are debtor – creditor relations between different enterprises, and their inclusion onto a Register according to which the law provides a new means for paying off the enterprises' indebtedness at the level of those relations. The law does therefore indeed provide new opportunities for improving the financial situation of enterprise debtors and swift settlement of their debts before their employees in owed wages. However the legislators have turned this around, and through Article 34, item 15 of the Law «On enforcement proceedings», they have prohibited extracting owed wages from enterprises on the Register, according to the logic of the law, in order to improve the financial state of enterprises at the expense of miners' family income.[16]

The Law «On amendments to some legislative acts for ensuring timely payment of wages» No. 2103-IV, passed on 21 October 2004 amended Article 97 of the Code of Labour Laws of Ukraine [CLLU], Articles 15 and 24 of the Law «On remuneration» from 24.03.95 № 108/95-VR, and Article 2 of the Law «On introducing a moratorium on the mandatory sale of property» from 29.11.01 № 2864-III.

Article 97 of CLLU and Article 15 of the Law «On remuneration» state that: «*Payment for the labour of employees of enterprises is first priority. All other payments shall be carried out by the owner or authorized representative of this body only after fulfilling commitments on payment of wages*».

Article 24 of the Law «On remuneration» reads: «*The timely payment and size of wages may not be made dependent on executing other payments and their order of payment*».

Article 2 § 2 of the Law «On introducing a moratorium on the mandatory sale of property» states: «.*an appeal to have property of a debtor seized on a writ of execution to be enforced by the State Bailiffs' Service, aside from rulings with respect to payment of wages and other payments owed a worker in connection with labour relations*».

However the relevant amendments were not made to Article 34 of the Law «On enforcement proceedings» possibly because they were aimed at protecting the labour rights of employees.

[15] As in footnote 21

[16] Monitoring of adherence to minimum State standards and State guarantees in the mining city of Zorinsk in the Luhansk region (the «Nikanor-Nova» Mine). Carried out by the Public Committee for the Protection of Constitutional Rights and Civil Liberties, together with the Confederation of Free Trade Unions in the Luhansk region.

Yet when the Verkhovna Rada was passing the Law «On measures aimed at safeguarding the stable functioning of the fuel and energy industry», as pointed out above, the amendments were efficiently introduced to Article 34, item 15 of the Law «On enforcement proceedings», according to their regrettable legal logic.

It should be noted that amendments were deliberately not made to Article 31 of the Law «On reinstating the solvency of enterprises or declaring them bankrupt» from 14.05.1992 № 2343-XII due to the amendments introduced on 21.10.2004 to Article 97 of CLLU and Articles 15 and 24 of the Law «On remuneration». From now on payment of wages in Article 31 of the Law «On reinstating the solvency of enterprises or declaring them bankrupt» is relegated to second place of importance except for 3 months.

However the fact that minimum guarantees of payment of wages have not been met for a long period has led to a massive accumulation of concealed indebtedness as a result of wages being calculated according to reduced rates. All State structures and puppet trade unions prefer to say nothing on this subject. There have consequently been protest actions in connection with this by miners.

For example, to do something about wages owed workers at the Krasnopolyivska Mine of the LLC private enterprise «Karat» in December 2006 united to form an Independent Trade Union of Miners of that mine and held a protest strike in the mine. As a result, the issue was resolved via the Economic Court of returning the Krasnopolyivska Mine to State ownership. The members of the Independent Trade Union had their owed wages paid in full however dismissed employees of the mine have still not received their money.

Infringements of labour rights are also seen in the use of a coefficient of labour input (CLI).in sharing out collective earnings. The norms on the distribution of CLI used at the enterprises monitoring run counter to Article 252-7 of the Code of Labour Laws*: «the brigade may divide their collective earnings with the use of a coefficient of labour input. The coefficient for members of the brigade is approved by the collective at the submission of the brigade leader (council)»*.

The present provisions, however, allow for the possibility of CLI being divided not only by the collective (or council of the brigade), but also by the boss of the unit or by foremen. Yet the legislation, as presented above, has entitled only the brigade collective to approve CLI.

The unlawfulness of one of these provisions was recognized by a court in considering a suit brought by employees of the Bilorichenska Mine.

Miners believe that the practice of reducing CLI for workers is often carried out without legitimate grounds, but rather for the arbitrary increase in the wages of certain privileged workers (brigade leaders, team liaison people) which are then probably shared out among foremen and bosses of the unit. The study into the practice of using CLI gives grounds for believing that it is an anachronism from the Soviet distribution system which at one time was part of the «battle against levelling» but has now turned into a corrupt means of distributing workers income.[17]

2. THE RIGHT TO JUST, SAFE AND HEALTHY WORKING CONDITIONS

From 2003 – 2006 the level of industrial accidents in Ukraine remained high. Despite an overall downward trend, the level actually rose in 5 regions, while in 13 regions an increase was recorded in cases of work-related illness. All this is the consequence of inadequate implementation of measures for preventing accidents, of a reduction in the funding of such measures and of the lack of interest in enterprises in improving their work safety record.

The number of industrial accidents fell by 8.1% in 2006 against 2005 however the number of fatal accidents only decreased by 0.8%, On the other hand the number of people suffering from work-related illnesses increased by 3.4% with the number of those causing the death of the patient rising by 36.8%

[17] Ibid

An analysis of industrial accidents in 2006 showed that the vast majority stemmed from organizational causes (77.9% of the total number); technical reasons (14,5%); and psychological – physiological causes (7,6%). The main types of accidents were falls (29,8%), incidents where something fell, crumbled or caved in, including earth (21,3%); where objects or parts of equipment moved, broke apart or turned over (19,7%); and road and transport accidents (6,9%). The highest rate of accidents in 2006 occurred at enterprises involved with coal mining, general construction, cultivation of crops, technical and other cultures, and black metallurgy.

Table 8. Industry safety in the national economy18

Social insurance accidents registered by working bodies of the Fund's Executive Directorate in 2006 (as compared with 2005)											
				Industrial accidents (according to the formal records on form N-1)				Cases of work-related illness at the working place ((according to the formal records on form P-4)			
Total number of industrial accidents in 2006	Total number of industrial accidents in 2005	including fatalities in 2006	including fatalities in 2005	Total number of injuries in 2006	Total number of injuries in 2005	resulting in a fatality in 2006	resulting in a fatality in 2005	Total number of work-related illnesses in 2006	otal number of work-related illnesses in 2005	The number of people who died from work-related illnesses in 2006	The number of people who died from work-related illnesses in 2005
26 203	27 204	1 474	2369	20 065	21 843	892	900	6 138	5 931	582	368

During 2006 6,751 miners were injured in coal mines, against 7,768 the previous year (a decrease of 1,017, or 13.1%). 168 people died, either as a result of accidents, or in the case of 26 miners from heart or vascular disease (this being 17.5 percent of the fatalities at the workplace). The number of fatal injuries had increased by 12 (168 against 156) or by 7.7% in comparison with 2005. The percentage of fatal accidents in the coal industry came to 15.6% of the total number of fatal accidents in all parts of the workplace (1,076). This means that every sixth person who died at the workplace was a miner. In recent years there has been an increase in the number of industrial accidents at mines and in non-State owned enterprises which are not under the control of the Ministry of the Coal Industry. In 2006 the rate of injuries and fatalities at such enterprises came to 41.7 % in the field (70 out of 168 accidents). At the present time there are 184 non-State owned enterprises and 389 that are owned by the State in this field.

We are convinced that the downward trend is not a clear representation since a significant number of such cases remain concealed as a result of the active efforts of the enterprises' administrations.

There has been no practical implementation of the relevant norms of the Law «On mandatory state social insurance against industrial accidents and occupational diseases which have caused disability» with regard to establishing reductions or additions to the size of insurance tariffs for businesses depending on the level of safety and of injuries.

[18] Report on the work of the Social Security Fund for Industrial Accidents and Work-related illnesses, the industrial safety conditions in the national economy, social protection for victims at the workplace and the use of insurance funding during 2006. Approved by Resolution No. 4 of the Board of the Social Security Fund for Industrial Accidents and Work-related illnesses, 28.02. 2007

None of the programs for improving the safety level, work conditions and the industrial environment financed by the Fund from 2002 – 2005 was implemented in full. The national programme for improving the safety level, work conditions and the industrial environment in 2001 – 2005 was only 47.1% implemented, in branch programmes – 29.8%. The programme for developing means for individual protection of workers – 64.3%. Untimely fulfilment of work, lengthy lack of implementation in the workplace of already completed scientific measures for preventing accidents led to their obsolescence and caused inefficient use of Fund spending amounting to 13 million UAH.

The Social Security Fund for Industrial Accidents carried out some of the duties vested with it only following court intervention. This applies, for example, to providing cars to people who were crippled at work and who are waiting in a queue for them. Over five years of the Fund's work, only 2.3 percent of those waiting to receive a car have been able to exercise their right to this. In 2005 less than 20 percent of the planned 5.3 million UAH was actually used to provide for these needs. In comparison with previous years the figure had grown, but not thanks to an improvement in the work of the Fund, but largely because 52 vehicles had to be purchased following court rulings. They were also made to pay off their debt to the Pension Fund.

We would cite a typical example of a fatal industrial accident where those responsible were not punished and there was not even any just compensation.

There were several fatal accidents at work all around the same time in November 2006 at industrial plants in the district centre Horodnya in the Chernihiv region. On 8 November in the afternoon, at a subsidiary of «Resski-lion» (the Horodnya flax mill) a 45-year-old mechanic Yury Tyshchenko became caught up in a machine. He died because the person responsible for controlling the mechanism was not at his workplace. They pulled the body from the machine only after 48 hours. It so happened that Yury Tyshchenko, in almost a month at the job, had not been formally registered as an employee and his work record did not have the relevant stamp in it. The plant immediately began asserting that he hadn't worked for them and had just turned up by chance. After conversations with the administration the witnesses also started giving muddled testimony. At present the prosecutor's office is working on proving that Yury Tyshchenko was indeed a fully-fledged member of the team. There is a paradox in this story in that Yury Tyshchenko is considered to have had unemployed status since he was registered with the employment centre and working at the same time. Therefore at present his family has no grounds for receiving material assistance from the Social Security Fund for Industrial Accidents.[19]

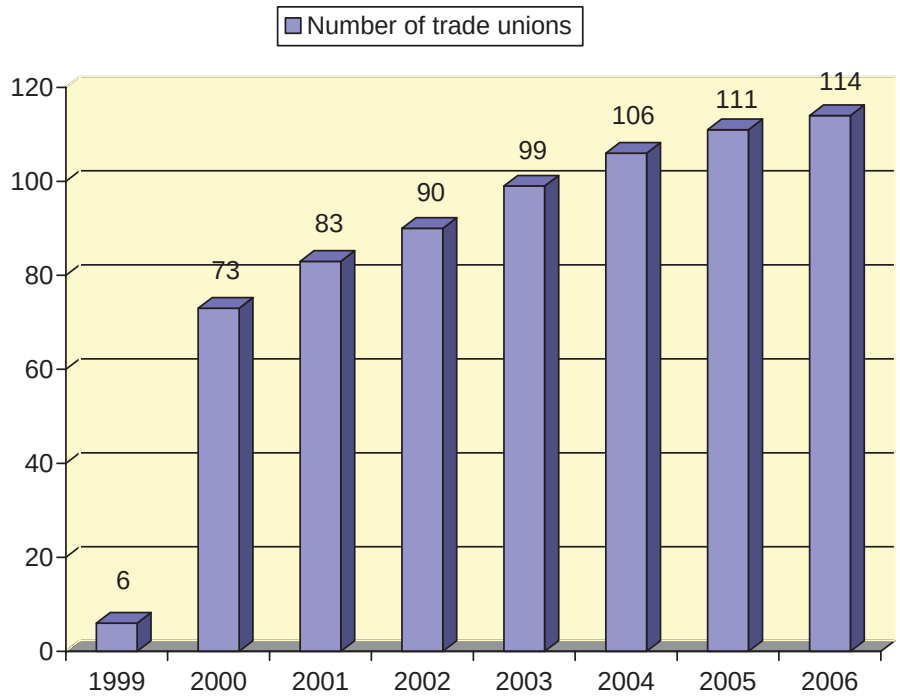
In December 2006 the State Committee on Industrial Safety, Labour Protection and Mining Supervision criticized the Social Security Fund for Industrial Accidents and Work-related Illnesses for inefficiency. Its press service stated that one of the main tasks of the Fund should be to carry out preventive measures aimed at eliminating harmful and dangerous factors and avoiding accidents at the workplace. However, as had become clear, from the Fund's budget for 2006 over the first 9 months only 1, 8 % of the planned funding had been allocated. Over the five years that the Fund had existed, its budget had tripled and came to almost 3 billion UAH, yet next year they were «planning» for an even greater number of victims, rather than preparing measures to prevent injuries at the workplace, the State Committee on Industrial Safety, Labour Protection and Mining Supervision asserted.

3. THE ACTIVITY OF TRADE UNIONS

It is also important to consider the activities of independent trade unions. One of their roles lies in achieving collective bargaining aimed at changing norms which worsen the situation of workers in comparison with current legislation. There are workers in some enterprises who are daring to defend their constitutional right to protect their labour and socio-economic rights and interests by forming trade unions.

[19] The newspaper «Hart», № 48 from 01.12.2006

*Table 9. All-Ukrainian trade unions and professional associations with legal status from the Ministry of Justice (as of 1 December)**



However trade union organizations which take a principled stand on defending the labour rights of their members immediately find themselves under severe pressure both from the employers, and from the «official» trade unions already present.

In 2006 the Ukrainian government received 9 information requests from the ILO. According to information from territorial State Labour Inspectorates, the checks found infringements of freedom of association as guaranteed by the ILO Convention No. 87 «Freedom of Association and Protection of the Right to Organize»[20]

When independent trade unions are being formed at an enterprise, the management and traditional trade unions jointly resort to repressive measures to stop them working and to lead to them dissolving.

Repeated appeals from the Confederation of Free Trade Unions of the Luhansk Region to the prosecutor's office, the authorities and to labour inspectorates have been almost unable to change the situation.

In 2005 primary organizations were created at the Dolzhanska-Kapitalna Mine and the Chervony Partisan Mine of the State Enterprise «Sverdlovantratsyt». Up till now the traditional trade union at the Dolzhanska-Kapitalna Mine has not complied with the instructions of the prosecutor's office to include the independent trade union of the same name on the united representative body for taking part in drawing up and passing a collective agreement, nor have they been provided with conditions for the work of an elected trade union body. The Sverdlovsk prosecutor's office has not taken measures to implement its own instructions and is not reacting to reports from the Independent Trade Union of violations of labour legislation.[21]

The response of the territorial State Labour Inspectorate for the Luhansk region from 15.03.2007 *№ 818/1 runs counter to norms of labour legislation. It states that the Independent Trade Union Dolzhanska-Kapitalna Mine, in concluding a collective agreement did not participate and did not join the functioning collective agreement. Therefore, it claims, the conditions of the collective agreement apply*

[20] See.: http://www.mlsp.gov.ua/control/uk/publish/article?art_id=50676&cat_id=50688

[21] Monitoring of adherence to minimum State standards and State guarantees in the mining city of Zorinsk in the Luhansk region (the «Nikanor-Nova» Mine). Carried out by the Public Committee for the Protection of Constitutional Rights and Civil Liberties, together with the Confederation of Free Trade Unions in the Luhansk region.

to the members of the Independent Trade Union as members of a work collective, but not as members of a trade union with which an agreement has been concluded. The mine administration thus has the right to refuse to provide it with a day to carry out civic work with retention of average wages as foreseen in Article 10 of the law «On trade unions, their rights and guarantees for their work» from 15.09.99 № 1045-XIV. This is despite the fact that Article 35 of the Constitution states that «all trade unions have equal rights».

Judgment of the Constitutional Court No. 14 rp/98 from 29 October 1998 confirmed that «the concept of a «trade union active at an enterprise, institution or organization» which is used in Article 43-1 § 1.6 of the Code of Labour Laws of Ukraine covers any trade union (trade union organization) which, in accordance with the Constitution and laws of Ukraine is created at an enterprise, institution or organization on the basis of free choice of its members for the purpose of defending their labour and socio-economic rights and interests, regardless of whether such a trade union is a party to a collective contract or agreement».

In July 2005 the Independent Trade Union 50th Anniversary of the USSR Mine in the city of Molodogvarkiysk of the open joint stock company Krasnodonvuhillya was created. In breach of Article 12 of the Law «On trade unions, their rights and guarantees for their work», the head of the mine administration lodged an application with the prosecutor's office to have a criminal investigation launched against the head of this trade union A.P. Pokuziyev, claiming that the protocol of the statutory meeting stated that there had been more people present than had actually been the case.

A criminal investigation into an alleged breach of Article 94 § 2 of the Criminal Procedure Code was launched against Mr Pokuziyev on 26 December 2005, however up till now Mr Pokuziyev has not been shown the given resolution. After these actions by the prosecutor's office and MIA investigators, the criminal investigation was twice suspended by investigators from the Krasnodon department of the MIA in the Luhansk region however the prosecutor's office in Krasnodon cancelled the decisions to suspend it.

The answers from the Krasnodon MIA department from 1 February and 16 June 2006 confirm that the criminal investigation was not launched against Mr Pokuziyev, but over the actual breach. The summons sent to Mr Pokuziyev throughout 2006 also confirm that there are no criminal proceedings against him and that he is being called as a witness, not as a suspect.

Nonetheless, since 2005 and to the present day the mine administration are refusing to recognize the legitimacy of the Independent Trade Union 50th Anniversary of the USSR claiming that a criminal investigation has not been terminated against Mr Pokuziyev at their application. This is linked with the fact that Mr Pokuziyev previously headed an independent trade union at the same mine, and that he is adamant in demanding that the norms of labour legislation are kept and has on many occasions sent reports on abuses of official position both with regard to management of the mine and to Krasnodonvuhillya.

This criminal investigation is an example of the unconcealed repression of a worker who has the dignity and courage to assert his rights and those of his colleagues. Even if the statutory documents when forming the independent trade union had been falsified, and this is not the case, are such actions so publicly dangerous as to be classified as a crime? Why is the prosecutor's office so insistent on a criminal investigation? Perhaps this is because *Krasnodonvuhillya* regularly provides financial «contributions» to the prosecutor's office (the independent trade union of the Barakov mine have documents in their possession confirming this)?

4. PARTICIPATION BY WORKERS AND THEIR REPRESENTATIVES IN THE MANAGEMENT OF AN ENTERPRISE (ORGANIZATION, INSTITUTION)[22]

Both the ILO Convention and the European Social Charter view participation by workers in the running of the organization as an important form of social dialogue. Such forms of dialogue can be negotiations, joint consultations and taking part in concluding collective agreements or contracts.

[22] Material prepared on the basis of a project «Protection of the labour rights of State sector employees in Ukraine», carried out by the Free Trade Union for Education and Science with the financial support of the International Renaissance Foundation (2007). The researchers were Andriy Sokolov and Olena Hrabovska.

The procedure for collective bargaining, mechanisms for resolving disagreements arising during negotiations are regulated by ILO Convention No. 154 concerning the promotion of collective bargaining (ratified in 1981), Article 6 of the European Social Charter» and Articles 10 and 11 of the Law «On collective agreements and contracts».

According to international standards, collective bargaining is carried out between employers or a group of employers, an organization or organizations of workers in order to determine the conditions of work and employment, as well as to regulate the relations between employers or their organizations and an organization or organizations of workers.

The current law «On collective agreements and contracts» does not clearly define the parties to collective bargaining and does not resolve the question of designating fully authorized representation of the parties, does not delineate adequately the aims, objectives and competence of separate levels, in particular branch and nationwide. The law does not allow for the right of workers' representatives to hold collective bargaining if there are no trade unions or other authorized collective bodies.

It should be noted that there is no norm in Ukrainian legislation which obliges any of the parties to begin collective bargaining. In practice this has led to a situation whereby at State enterprises work on preparing a collective agreement is often late, while at private enterprises collective agreements are not, as a rule, made. At the latter there is often no trade union, and employees in conditions of rising unemployment, concerned about holding on to their jobs, do not raise the issue of concluding a collective agreement. The owner basically doesn't have an interest in making such an agreement. All of this results in a limitation of workers' rights.

Furthermore in current Ukrainian legislation there is no clear mechanism for exercising the right to collective bargaining, nor is there a minimum fine for not concluding a collective agreement or for not complying with it. The law does not envisage the right of dismissal for avoiding taking part in collective bargaining. At the same time, bringing proceedings against a person is still no guarantee that after this collective bargaining will begin. The law does not envisage the use of force to ensure the holding of collective bargaining and it therefore quite often happens that after proceedings are imitated, the collective agreement is not actually concluded.

The Administration of the Mariupol Illych metallurgic plant, represented by the head of the board on 20 12. 05 № 09/4626 refused to allow the independent trade union to enter into the bargaining process on making up a collective agreement. In its turn, the head of the old trade union in a letter from 21.12.05 p. № 6172 refused to allow the independent trade union to form a joint representative body at the plant, claiming that a collective agreement had been adopted back in 2001 and there was no need to adopt a new one or to add amendments to the collective agreement from 2001.

In Chernihiv a suit was filed against the administration of the Chernihiv Regional Shevchenko Musical and Dramatic Theatre. The claimants alleged pressure and persecution of members of the independent trade union seen in the publishing of reprimands and the dismissal of one employee. The court ruling that the order regarding the reprimands and the dismissal should be revoked. At the present time, however, the theatre administration is still refusing to take part in collective bargaining and is not allowing trade union representatives to see the existing collective agreement.

As a separate issue we would mention the problem of court rulings not being adhered to, either by the public authorities or by employers. For example, in Nikopol (Dnipropetrovsk region), the management of the Nikopol Southern Pipe Plant in October 2006 refused to implement a court ruling allowing representatives of the independent trade union to take part in collective bargaining and sign a collective agreement.

An example of success in defending the right of workers to participate in management is provided by the First Children's Theatre for children and young people. 'For the first time since Ukraine regained independence and since the new version of Article 45 of the Code of Labour Laws came into force, a primary trade union organization in Lviv succeeded in getting the head of the theatre dismissed on the basis of Article 45 of the Code which allows for the termination of a work contract with a manager at the request of an elective body of the primary trade union organization. The demand for his dismissal was based on systematic violation of the rights of trade unions, in particular through not providing information about the social and financial activities of the theatre, refusing

to take part in drawing up and signing a collective contract, as well as by persecuting workers over their membership of the trade union (declaring reprimands, taking away bonuses, etc).

5. HIRING AND FIRING[23]

The most common form of labour agreement is a contract for an indefinite period. Through these the State protects workers' rights and promotes stability in labour relations. Of some concern, however, is the addition to Article 39 § 6 of the Law «On trade unions, their rights and guarantees for their work», introduced on 13 December 2001. According to this, in cases where in the decision there is no justified refusal to agree to dismissal, an employer has the right to dismiss an employee. This generally negates the legal nature of provision of such consent by a primary trade union to the termination of a contract at the initiative of the employer since the concept of «justified refusal» is not set down in legislation and is therefore a value judgment. This attitude by the legislators is not warranted since the will of the trade unions in such cases with respect to not giving consent is clear. The decision of a trade union to not give consent can be withdrawn later at any time and the relative grounds added.

As a result, dismissals without this being agreed with the primary trade union occur in virtually every region.

At the present time a civil suit has been filed with the local Shevchenkivsky District Court in the Lviv region. Three teachers from a Lviv private school are appealing against unlawful dismissal and unlawfully low calculation of their pay guaranteed by Article 57 of the Law «On education», payments for health treatment, for long service and compensation for loss of these payments.

6. THE RIGHTS OF LABOUR MIGRANTS

Another important area is protection of the labour rights of people working abroad. Given that a considerable number of Ukrainian nationals are working in European countries there is an urgent need for Ukraine to ratify the European Convention on the legal status of migrant workers which Ukraine signed on 2 September 2004. This Convention binds member states in accordance with international human rights agreements to respect and safeguard the rights of all labour migrants and members of their families while they are on their territory under their jurisdiction. Ratification of this Convention will heighten legal and social protection for Ukrainian nationals living and working in countries of the Council of Europe in accordance with the legislation of the receiving country. Labour migrants and members of their families will enjoy a number of rights, namely:

– The right to accept real job offers;

– The right to freely move about for this purpose around the territory of member States of the Council of Europe;

– The right to be in one of the countries of the member States of the Council of Europe, to work there in accordance with legislation regulating employment of nationals of that country;

– The right to remain on the territory of one of the Contracting Parties after the conclusion of the labour activities on the conditions agreed by the Contracting Parties;

– Migrant workers from member states of the EU have the same right to receive assistance from employment services of the receiving countries as nationals of that county seeking work. Special procedure may be established for employment of migrant workers, for example in registering with employment services.

– In their labour relations migrant workers shall have equal rights with workers of the receiving country. Work contracts imposing discriminatory conditions are not valid.

– Labour migrants shall have the right to take up paid employment in another country together with members of their family on condition that the necessary living circumstances are provided, and in certain circumstances to remain in the country permanently;

[23] Ibid.

– Labour migrants shall have the same rights as workers of the country with regard to renting (buying) accommodation.

The present bilateral work agreements with Poland, Lithuania, the Russian Federation, Moldova, Belarus, Latvia, Slovakia, Armenia and Vietnam cannot fully safeguard the rights of Ukrainians working abroad.[24]

7. RECOMMENDATIONS

1) Increase the amount spent on labour as part of the cost of production thus increasing the value of labour, and accordingly ensuring the right to a decent level of remuneration.

2) Ensure that laws on remuneration, including those on minimum legislative guarantees, are complied with throughout Ukraine.

3) Find effective mechanisms for resolving problems with debts of enterprises and the State in owed wages and other social payments.

4) Ratify the European Convention on the legal status of migrant workers in order to heighten legal and social protection for Ukrainian nationals abroad.

5) Ensure enforcement of guarantees for the work of all, including independent, trade unions, as organizations defending workers' interests.

6) Refine current legislation on bargaining procedure. This includes regulating the issue of parties to collective bargaining; organizations holding collective bargaining; preparing a draft for a collective agreement; the makeup of the commission responsible for drawing up the draft; places for holding bargaining talks; guarantees and compensation during the bargaining period for taking part in the bargaining.

7) Remove from Article 39 § 6 of the Law «On trade unions, their rights and guarantees for their work», to need for a justified refusal by a trade union to consent to a worker's dismissal.

8) Supplement Article 2 of the Code of Labour Laws of Ukraine «Fundamental labour rights of workers» with the right to information and consultations within the framework of the enterprise; introduce legislation on procedure for providing information and holding consultations At the same time acknowledge at legislative level the right of workers to information and establish the responsibility of employers to provide the necessary information and their liability for not adhering to this;

9) Improve legal regulation for extracting money recognized by the court as owed by enterprises, especially those which are State-funded.

10) Regulate the use of labour input coefficients in order to prevent this indicator being used for corrupt redistribution of workers' income.

[24] Y. Antonenko: Regulation of the labour activities of Ukrainian nationals temporarily working abroad: http://www.dcz.gov.ua/kir/control/uk/publish/article;jsessionid=B32001CF0D85BB1F3586E78BCC6EDF0A?art_id=3635433&cat_id=367421

XVI. THE RIGHT TO EDUCATION[1]

Education is one of the oldest social institutions reflecting society's need to pass on knowledge and skills and prepare new generations, helping them to resolve the economic, social and cultural problems which face society. In the contemporary world education is a vital factor for the development of any country, which makes the safeguarding by the government of the right to education of particular social importance.

Education in Ukraine, especially elementary and secondary education, is chronically under funded. There is a permanent shortage of money not only for developing the education system and its infrastructure, but even for the most basic needs to ensure the straight survival of educational institutions.

School education remains based on post-Soviet rather than market economics. A given school is funded not according to standardized expenditure per student, but on the principle: «the district budget will allocate so much, and let the school head find the rest where s/he can». Control of school education is entirely under State departments of education. Educational associations and public councils are only allowed to imitate elements of civic society and have no access to the financial resources of the region, city or settlement. In general school heads and managers of the district and regional educational system are not educational managers. Schools, as before, do not have autonomous status. Their predicted costs for the year are drawn up without their participation. Since the list of such costs leaves out a number of school expenses, the schools are unambiguously pushed towards the «shadow» economy.

At the same time parents who have decided to place their children in private schools find themselves in a fairly strange situation since they pay for their children's education twice: first through taxes for maintaining State-funded schools where their children don't study and then directly to the private institution[2]

An analysis of laws and subordinate legislation on education creates a mixed impression since even those imperfect norms established back in 1996 are not implemented. At the same time, the numerous references in the laws on education to future resolutions by the Cabinet of Ministers, as well as the norms of the yearly State Budgets, give grounds not only for untimely or partial implementation, but even for their being reviewed. We can cite the following examples:

1. Article 53 of the Constitution which reads: «The State ensures accessible and free pre-school, complete general secondary, vocational and higher education ...» which is transformed in the Laws «On education» and «On general secondary education» into: «Ukrainian citizens have the right to accessible and free education». Then the «Regulations on general educational institutions», approved by Cabinet of Ministers Resolution, state that «the main objective of general educational institutions is to ensure the exercising of the right of citizens to general secondary education». In fact, a judgment of the Constitutional Court from 04.03.2004 regarding an official interpretation of Article 53 of the Constitution stated that spending on the educational process must be undertaken «on a normative basis from funding fully provided by the relevant budgets».

[1] Prepared by Maxim Shcherbatyuk, UHHRU.

[2] O. Onyshchenko «Who calls the tune when the parents are paying?» // Dzerkalo tyzhnya № 4 (633) from 3-9 February 2007 p. http://www.zn.kiev.ua/ie/show/633/55730/

2. Article 61 of the Law «On education» stipulates that «the State shall provide budgetary allocations for education at a level no lower than 10% of national revenue».

3. Article 57 of the same law declares various guarantees from the State to educational staff including «establishing extra payment for specialists working in the education system to the level of the average monthly pay throughout the national economy» and «establishing average rates for educational staff of educational institutions at a level no lower than the average wages of industrial workers».

4. Articles 12 and 14 of the Law read that «the Ministry of Education of Ukraine sets minimum norms for the material, technical and financial provisions for educational institutions» and «local State authorities shall establish the size of budgetary funding for educational institutions which are no lower than the minimum norms imposed by the Ministry of Education».

5. «Self-government of educational institutions shall allow for their right to independently resolve issues of economic and financial management activities, and to independently use all forms of allocations» [Article 17 of the Law «On education»). Article 10 of the Law «On general secondary education» states: «a general educational institution is a legal entity.»

6. Point 8 of the «Regulations on general educational institutions» reads: «a general educational institution is a legal entity, with its own bank accounts and financial statements». Point 68 of these Regulations stipulates that the main source when drawing up the cost estimate shall be «funding from the relevant budget allowed for by the norms for funding of general secondary education within the scope of the State Standards for general secondary education». Point 71 gives schools the right «to purchase or hire the necessary equipment and other material resources, use the services of any business, institution, as well as finance at their own expense measures to improve the social and everyday conditions of the collective».

7. Article 5 of the Law «On taxation on business profits» seemingly allows the inclusion among gross expenditure of «the funds or property transferred to the educational institutions».[3]

Like every registered institution, particularly those which are State-funded, schools work in accordance with yearly cost estimates of monthly income and outgoings. In theory such an estimate should, on the one hand, take into account all forms of school spending, while on the other, have an income part to provide for this expenditure. When the income part is more than the outgoings, one has a surplus, however when the income is less than expenditure, there is a budgetary deficit. All of this is basic economic literacy. However since the State cannot afford that each of the 22.5 thousand schools approves a deficit budget, in practice the cost estimates include the expenditure only on certain, so-called protected items – salary, payments to State social security funds and (in recent years) communal services. Against the name of the remaining items of expenditure from the general fund, the form for a typical cost estimate has a blank, as though there weren't any such expenses in the school.

One of the lawful ways around this is to create a supplementary cost estimate, a so-called special fund for income and outgoings. In this variant, the duties are as follows: the school head is responsible for seeking investors, and the government – for permitting or prohibiting any use of the investments attracted (departments of education, the State Treasury, the Control and Audit Department). The special fund can finance everyday or stationery requirements, the purchase, repairs and servicing of educational technology, work-related trips by teachers, transport and communal services, repairs to premises, purchase of medicine, textbooks and teachers' handbooks, etc A separate subject for the special fund estimate are paid services, with this enabling payment for supplementary lessons out of class time with students. However the normative base for paid services is so inadequately set out that even an unbiased prosecutor's office check can always find financial irregularities.

A typical example was the case against the Head of the First Ukrainian Lyceum in the Donetsk region, Mykola Konobrytsky, which resulted in the Kramatorsky City Court on 19 May 2006 sentencing him to 3 years imprisonment. The grounds were that some positions had been created for technical assistants and cloakroom attendants, with the salaries allocated in fact being used to buy everyday,

[3] Shushkevych, Y. The School economy: looking for a light at the end of the tunnel // Dzerkalo tyzhnya № 2 (631) from 20-26 January 2007 p. www.zn.kiev.ua/ie/show/631/55619/

stationery and medical items. Records were scrupulously kept of all expenditure (receipts, invoices, etc), yet nonetheless, the court stated that the school head «had appropriated 4,436 UAH 88 kopecks which constituted appropriation of property on a large scale»[4]

Another, seemingly lawful way is to register a separate legal entity – «an educational donor», for example, a charitable fund which will take on the extra financing of school needs. However in this case too it is impossible to avoid accusations of extorting money. Particularly since the money for such funds are effectively collected on a compulsory basis from all parents of the children studying in the given school. That means that education stops being free. There is, as well, absolutely no control over how the money gets spent.

A solution might be to seek real, and not declared, autonomy for each of the 22.5 thousand schools, while at the same time reforming the system of education management along European lines. A system also needs to be established of socio-economic support for schools from civic support via school councils, educational associations, independent trade unions etc. It would also be important to move towards the funding of schools from the budgets of different levels (nationwide, regional, local) according to standardized norms for expenditure per student. Finally, the economic skills of school heads and educational managers need to be significantly improved with them gradually moving away from being «housekeeping» or «methodologist» heads to real managers.[5]

At the same time, however, it should be noted that these objectives are complicated by the fact that the self-sufficient authorities, limited in their material and financial opportunities, systematically ignore proposals from schools while demanding that «equal access to high-quality education» be provided at no cost to parents. Civic society is not mobilized and politicized deputies have no contact with the public.

Parents of school children want schools to spare them as much as possible from issues with education, upbringing and the leisure time of their children. In general they don't want to deal with these problems and become irritated at reports of school difficulties.

Schools are forced to manoeuvre between all the shortcomings of the authorities and society, balancing on a tightrope between financial infringements and instructions on providing a high quality level of education.

Teachers are en masse disgruntled with their social position yet remain passive, being afraid of losing their jobs, while head teacher or teacher associations are few in number and have little influence.

Problems are not restricted to schools, but are also experienced by higher education institutions. There is a fairly large divide between teaching work and research in favour of the former. This is leading to a situation where the academic component has gradually moved into the background. Up to 30% of Ukrainian universities do not carry out research during studies. As a result, one sees a standard transfer of old knowledge, according to notes yellowed with age.

There are also problems at higher education level with providing student accommodation. This was vividly expressed in an appeal by the civic network OPORA to the Minister of Education and Science S.M. Nikolayenko. The appeal stated that the regulations or charters functioning in student hostels are not open and do not guarantee students a «human existence». There are reports of identical problems and similar situations from all parts of Ukraine. For many students it is clear that there is corruption and abuse of their official position among hostel administrations. It is even clearer that administrations try to cover this up rather than systematically setting out to resolve the most urgent problems.

It is also noticeable that the current normative base regulating how students are placed in hostels or removed from them, as well as their stay there, is outdated and does not comply with the needs of the day. Young people these days cannot imagine their studies without computers and

[4] Hromovy, V. The Shadow economy within the schools: impossible to legalize banning?! // Dzerkalo tyzhnya № 48 (627) from 16-22 December 2006 p. www.zn.kiev.ua/ie/show/627/55353/ Material in English on this case (in which Mr Konobrytsky's appeal was successful following a public campaign can be found at: http://khpg.org/en/index.php?id=1155573699, http://khpg.org/en/index.php?id=1154081597, http://khpg.org/en/index.php?id=1153872601&w=Konobrytsky

[5] Shushkevych, Y. The School economy: looking for a light at the end of the tunnel // Dzerkalo tyzhnya № 2 (631) from 20-26 January 2007 p. www.zn.kiev.ua/ie/show/631/55619/

the Internet. The Resolution of the Council of Ministers of the Ukrainian SSR from 3 June 1986 No. 208 «On approving Sample regulations on hostels» and «Sanitary rules for setting up, equipping and maintained hostels for working students and young school students», approved by the Head Sanitation Doctor of the USSR No. 4719 from 1 November 1988 are still in force. On the other hand, the standard regulations approved by Order of the Ministry of Education from 9 December 1993 No. 440 have not been registered with the Ministry of Justice.

Given the demands of the present time, the material and technological conditions in hostels which often fail to meet elementary sanitary norms are out of date. The toilets are in a terrible state, with both the plumbing and the tiles being broken and there are problems with heating. One could continue for a long time listing such problems. The annual cosmetic repairs are usually carried out at the students' expense. This leads to numerous cases of abuse by the administration. Furthermore, the shortage of places in student hostels is catastrophic and often provides another source of corruption. In practice, so as to free up places for the «right people», hostel residents find themselves under pressure from the administration since a couple of formal reprimands provide justification for evicting a person. Sometimes manipulations with places and collection of money for repairs are accompanied by threats and intimidation. Students from other places, who need the reasonably cheap accommodation in hostels, are forced to endure even violations of human rights, their honour and dignity[6].

The situation is also not good with regard to the appointment of top management staff for higher institutions. This sometimes takes place in a non-transparent fashion and with infringements of legislation.

It is worth citing the example here of the conflict which arose over the appointment as Rector of the Zaporizhya Regional Institute for Postgraduate Educational Studies V. Pashkov who represents the Party of the Regions. For example, there was no competition to fill the vacancy which is a direct infringement of the law. This was confirmed by the protest made with regard to the decision by the regional prosecutor's office. The conflict was accompanied by a protest from the staff of the institute against such a violation of legislation, as well as by civic activity around the issue.[7]

Another problem is the system in Ukraine for financing expenditure on training specialists with higher education on government commissioning which does not meet the requirements of current legislation. It also fails to promote the efficient use of government funding since the end result, the training and graduation of specialists with higher education does not directly depend on the need for such specialists, the actual requests for them from State enterprises, institutions and organizations, and does not guarantee employment according to one's chosen profession.[8]

The analysis carried out by the Accounting Chamber shows the lack of a government approach to using government funding on training specialists with higher education. It also demonstrates that in higher education there is effectively a commercial approach to the provision of educational services, with the level of these steadily declining together with the huge increase in the number of university or institute graduates. Over the last ten years the number of State-run institutes has decreased by almost 200, while more than 100 private institutes have appeared. The number of students in private educational institutions has become almost six times greater without the corresponding provision of lecturers. Nor is a high quality of lecturing personnel assured in State-run higher education institutions. It should however be mentioned that in 2006 the Ministry of Education and Science tried to bring order to the work of higher education institutions by carrying out checks and revoking the licenses of those which did not meet the relevant standards.

The auditors commented that the Cabinet of Ministers had not provided for the implementation of the President's instructions on defining predicted indicators for the country's need for qualified workers and specialists, and in contravention of legislation had not designated a network of higher education institutions. The inaction of the Government had led to State-funding of higher education institutions from the State Budget without the socio-economic and cultural-educational

[6] Appeal from the civic network «Opora» to the Minister of Education and Science S.M. Nikolayenko. UHHRU site: www.helsinki.org.ua/index.php?id=1159957408

[7] Piskovy V. «School of ignorance» // Dzerkalo tyzhnya № 47 (626) from 9-15 December 2006 p. www.zn.kiev.ua/ie/show/626/55281/, «Educational Problems» // Dzerkalo tyzhnya № 45, 2006 p.

[8] Conclusion of the Accounting Chamber of Ukraine «State orders not for State needs» www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=703971&cat_id=411

need for these having been identified. It had also caused duplication by higher education institutions of areas of training, frittering of State funds and inefficient use of these funds. This was linked to the fact that the Ministry of Education and Science, as well as other main bodies in control of higher institutes define the need for specialists with higher education on the basis of what the institutions themselves actually offer. As a consequence, the admission figures exceed the yearly need by 50-80 percent, especially in medical, legal and economic specialities. This is inevitable when the institutions are oriented on an uncontrolled and stirred up demand for higher education, and not on the actual needs of the State.[9]

The inadequacies of the current normative base for preparing, placing and implementing government commissioning for the training of specialists with higher education, which is based on the need to provide for the needs of the State sector of the economy, restrict the employment opportunities of graduates and are ineffective. Over recent years jobs were not found for 1,646 graduates and therefore the 22 million UAH which the State had spent on their education had been used inefficiently. A further 1,686 graduates found work by themselves in private business, this reflecting an inefficient use of nearly 19 million UAH of State funds and the effective investment in business.

The Ministries of the Economy and of Education and Science have not taken measures to prepare new methodological approaches in determining the State order for training of people with a higher education which take into account the public need, the needs of those placing the order and of the specific individual. The irresponsible attitude of the Ministry of Education and Science, together with other ministries and departments, as well as heads of higher education institutions, leads to a glut in the market for people with a higher education with a low level of qualification, and additional spending by the State on retraining these people.

It should be mentioned that the possibility to receive free education, enshrined in the Constitution, is being placed in question by the government. For example, back at the end of 2005, the Ministry of Education and Science put forward a draft law «On amendments to the Law «On higher education» (on the training of personnel).[10]. The draft law flagrantly violated the constitutional rights of students. The latter were most outraged by the regulations which stated that graduates of a higher education institution whose studies were paid for by the State, must after the end of their studies work for three years in their field at a working place designated by the State. If a person refused, s/he would have to compensate the State for the cost of her/his studies with this being index linked to the rate of inflation. Effectively, in the most typical Soviet tradition, the State was imposing a three-year period of bondage for State-funded students. (Several months later the Minister of Health Mykola Polishchuk attempted to impose the same rule through his decree for medical students.)[11]

These regulations were unconstitutional since they contravened Article 22 of the Constitution by diminishing the content and scope of students' existing rights and freedoms. They also contradicted Article 53 of the Constitution which guarantees citizens the right to free higher education, i.e. without any kind of payment, as well as the Abolition of Forced Labour Convention which obliges Ukraine to abolish any compulsory or forced labour and to not resort to any form of this. At the end of 2005 the law was vetoed by President Yushchenko. Nonetheless, throughout 2006 the Ministry of Education and Science reiterated the alleged need to introduce amendments to legislation regarding compulsory work placing of State-funded graduates.

At the same time the vetoing of this notorious draft law did not remove many problematical issues, such as the need for a fixed linking of the size of student grants to the subsistence level (25-30%). The present law only establishes the minimum level for the student grant, making it possible to increase this though subordinate legislation. In the Law «On higher education» there is still also a point which states that decisions of bodies of student self-government are of an advisory nature, this rendering meaningless the whole concept of student self-government[12]

[9] Ibid.
[10] Registration No. 3323 from 2 April 2003 was passed by the Verkhovna Rada in 2005.
[11] Pechonchyk, T: Council or Betrayal? Student councils linked to those with power – stillborn babies of post-Soviet democracy // Dzerkalo tyzhnya № 13 (592) 8-14 April 2006 року http://www.zn.kiev.ua/nn/show/592/53058/
[12] Pechonchyk, T Student veto for the law – old problems // Dzerkalo tyzhnya № 48 (576) 10-16 December 2005 http://www.zn.kiev.ua/nn/show/576/52011/

RECOMMENDATIONS

1) Resolve the problems of school funding by allowing schools real autonomy, not just on paper; introduce a system of socio-economic support for schools from civic support via school councils, educational associations, independent trade unions etc; move towards a system whereby schools are funded from the budgets of different levels (nationwide, regional, local) according to standardized norms for expenditure per student.

2) Ensure the unity of educational and academic processes in higher education institutions.

3) Guarantee the rights of students to be provided with the necessary books, as well as with student accommodation.

4) Guarantee that those in charge of higher education institutions will be appointed in full compliance with Ukrainian legislation.

5) Ensure the functioning of an efficient system for funding the training of specialists with higher education commission by the State commission and to prevent and uncover abuse in this area.

6) Ensure the constitutional chance to receive free higher education in Ukraine.

7) Resolve problems with the development of student self-government, including through amendments to legislation.

XVII. THE RIGHT TO HEALTH CARE[1]

1. GENERAL ISSUES

Article 49 of the Ukrainian Constitution guarantees each citizen «the right to health protection, medical care and health insurance. Health protection is ensured through State funding of the relevant socio-economic, medical and sanitary, health improvement and prophylactic programmes. The State creates conditions for effective medical service accessible to all citizens. ...The State provides for the development of physical culture and sports, and ensures sanitary-epidemic welfare».

The European Social Charter which Ukraine ratified in 2006 also states that «with a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: to remove as far as possible the causes of ill-health; to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; and to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

The priority tasks for implementing these constitutional commitments are reform of the system of health care; review of the principles of its financing; formulation of the legislative principles for the introduction of health insurance; fighting the epidemic spread of tuberculosis, HIV-infection and AIDS; reduction in the level of child mortality; and ensuring the development of medical services in rural areas.[2]

It is chronically ineffective use of funding even more than the low amounts which the government allocates for health care – only 3.7& of the GNP – that makes far-reaching reform of the system a vital challenge facing the government.[3]

What is hindering implementation of such reform is the excessive number of «free» medical care guarantees. An unlimited scope of government guarantees for free medicine is incompatible with the restricted means available for fulfilling these commitments. Even the most affluent socially-oriented countries do not assume obligations on such a scale.

The private payments which the public pay for medical services are against the principle of equity. On the other hand, «free» medical care is a myth. Since 1996 the share of individual payments officially paid by the population has risen from 18.8% to 38.5% of the overall spending on health care. If we take unofficial remuneration into consideration, then that figure will rise to 52%. This means that in fact Ukrainians are paying more than half the cost of medical care out of their own pocket. Most of this money goes on medicines. Widespread payments for health care make it less accessible for the poorer parts of society which infringes the principles of justice and equity. Charges make the poorer put off going to the doctor as a result of which they often only go when the need is already urgent when an illness that might have otherwise been curable has gone beyond that stage.

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[1] By Andriy Rakhansky, Inna Zakharova, Yevhen Zakharov, KHPG and Maxim Shcherbatyuk, UHHRU.

[2] Cabinet of Ministers Resolution № 733 from 25 May 2006 «On summarizing Ukraine's socio-economic development in the first quarter of 2006»

[3] «The State and the Citizen: Delivering on Promises», Analysis of socio-economic policy carried out by the Blue Ribbon Commission in 2006.

Informal payments in the area of health care foster corruption. Such informal payments commonly made for medical services are viewed by a lot of medical workers as justified compensation for their low salaries. The volume of these payments is large, and while on the one hand they keep medical workers from abandoning the profession, they do give preference to the wealthy and undermine the transparency of the system, which has a demoralizing effect. There are cases where doctors demand extra payment for treating their patients with proper care. This has become so habitual in many medical institutions that doctors don't even talk about it directly: the patient already knows from experience that if s/he doesn't pay up, this will be reflected in the treatment. There is believed to be particular corruption over any kinds of medical operations, services during childbirth and examinations using expensive equipment. According to official data from the State Judicial Administration and the Supreme Court, only two people have been convicted under Article 184 of the Criminal Code (violation of the right to free medical care). The offence is punishable by a fine of up to one hundred times the minimum wage before tax or custodial arrest for a period of up to six months.[4]

It must be acknowledged that the present mechanism for funding reduces efficiency of the health care system. «Public funds are allocated, in essence, to support the costs of existing health care facilities and not to achieve health care results. Hospitals face little incentive to reduce the number of admissions, as financing is still based on bed capacity. This creates perverse incentives, resulting in a rise in unsubstantiated hospitalizations. Hospital stays in Ukraine are among the longest in Europe, at an average of 14.4 days. State and communal health care institutions continue to have the status of spending units with very limited rights and incentives to make management and financial decisions that would allow for more efficient use of resources. Allocation of budgetary funds is based on a list of permitted line items, with norms set by the Ministry of Health. Although financing is decentralized, with 80 percent of total funding allocated at the regional and local levels, health care administrators have little authority to deviate from rigid line-item budgets. Budgets are strictly itemized, and the volume of resources set aside for each budgetary item is strictly regulated. Similarly, health care professionals receive fixed salaries set in accordance with a national pay scale, so remuneration bears little relation to quality of work or number of patients seen. Staffing levels are determined in accordance with norms set by the Ministry of Health, most often based on a set standard of hospital beds per 10,000 people».[5]

Another major problem is the neglected state of primary care. «Too much funding goes on expensive inpatient care, while less costly primary care is neglected. Ukraine has 5.94 hospitals per 100 thousand people, higher than the EU average of 3.2. Maintaining such a large number of inpatient facilities restricts funding for other purposes. The volume of specialized care exceeds that of primary care, turning the typical «heath care pyramid» upside down. Primary doctors constitute just 26 percent of all doctors, whereas in some European countries the share is as high as 50 percent. Ukraine has only 3,354 of the 33,000 general and family physicians it needs, so hospitals and ambulance services are used to provide routine medical assistance. By one estimate, nearly one third of hospital patients would qualify for outpatient care.[6]

The introduction of health insurance has long been discussed in Ukraine however due to a whole series of obstacles this mechanism for financing health care has not been initiated. The issue has been discussed widely in society, and both its importance and the different possible points of view make debate on the principles, methods and ways of implementing it in Ukraine heated. At present there are two main competing concepts for introducing health insurance. The first asserts the need to introduce mandatory health insurance based on budgetary funding for the heath care system. The other proposes mandatory health insurance with the involvement of insurance companies, as well as the government. Supporters of both concepts have tabled their draft laws in the Verkhovna Rada. For example, the first option was proposed in Draft Law № 0944 «On State social health insurance» which in autumn 2003 was not far off getting enough votes to be passed in its

[4] «The right to health care» www.helsinki.org.ua/index.php?id=1152704590
[5] The State and the Citizen: Delivering on Promises», Analysis of socio-economic policy carried out by the Blue Ribbon Commission in 2006.
[6] Ibid

third reading in the Verkhovna Rada. At present, there is a new attempt, with Draft Law № 3155-1 «On general mandatory State social health insurance» tabled at the beginning of 2007. Opponents of this put forward their Draft Law № 3370 for Verkhovna Rada consideration during the pre-2006 election term. That was not voted on, however already in September 2006 Draft Law № 2192 was tabled, this based on involving private insurance companies.

It must be said that each of these concepts has its advantages and shortcomings. The introduction of health insurance oriented on a model of mandatory civil insurance could lead to a regressive character of financing (the poor pay relatively more than the rich), there could be different programmes of services depending on the amount of insurance; competing insurance markets could be created which would almost inevitably lead to less justice, especially with regard to the elderly or those with chronic conditions. In addition, this model of health insurance involves a mechanism for management which is quite complicated to implement.7 There have not been any clear moves towards introducing health insurance and this reform which could have realistically helped resolve the problem of funding has been put off indefinitely.

The lack of adequate quality control in health care should also be mentioned. Control over quality is concentrated on the actions of personnel and not on the results of the medical assistance. Unlike private institutions, State and communal medical institutions do not require licensing. Certification of medical personnel is not monitored by self-governing professional institutions specializing in medicine. The quality of medical services remains a major problem. A lot of specialists have left the State sector because of pitiful funding and moved to private hospitals or to some other sphere. Human rights organizations often receive complaints about doctors' actions leading to grave consequences. Yet due to «corporate solidarity» it is very difficult to prove negligence in court and the Prosecutor is reluctant to investigate such complaints. There are therefore only isolated cases where medical workers have been brought to answer for harm inflicted through inadequate medical care.

There are also problems arising as a result of contradictory legislation. A number of laws aimed at introducing changes remain ineffective, partly due to the government's inability to provide the relevant rules or instructions on applying the laws. Nor is the legislation working for providing health care institutions with more autonomy via transforming them from budget-funded organizations into State enterprises.

Another problem is that of incomplete decentralization. «As so far enacted in Ukraine, decentralization does not give local or regional authorities discretion over health care spending. Although 80 percent of health care funds are disbursed at the local and regional level, allocations are determined centrally and quite rigidly. There is thus no incentive for smaller communities to pool their resources or to seek efficiency through the closure or consolidation of institutions too small to serve the community effectively, on the contrary, there is every incentive to fight to keep existing facilities operating.»[8]

The problem of infant mortality (in the first year of life) and child mortality (up to the age of 18) remains serious. The Deputy Minister of Health has himself stated that these mortality rates are continuing to rise.[9] At a special meeting at the Ministry of Health to discuss the problem, the rise in infant mortality was confirmed and broken down into different regions for the first six months of 2006. With an average for the country of 10.12 deaths per one thousand babies born, in the Zhytomyr region the figure was 14.79, in the Kirovohrad region – 13.98, the Chernivtsi region – 13.26 and Luhansk region – 12.87.[10]

In order to understand the magnitude of the problem, we can take the Zhytomyr region where in 2006 a check was carried out of infant and maternal mortality rates by a special commission set up by the Ministry of Health. The conclusions were not cheering. Over 5 months of 2006, the mortality rate of infants under a year old had risen by 25.7% in the region as compared with the previous

[7] «What kind of health insurance should there be in Ukraine?». http://www.helsinki.org.ua/index.php?id=1162997437

[8] The State and the Citizen: Delivering on Promises», Analysis of socio-economic policy carried out by the Blue Ribbon Commission in 2006

[9] V.V. Chornomorska: Rising infant and child mortality in Ukraine: the Ukrainian Medical website Hypocrites www.hippocrat.com.ua/publicism/death-rate/

[10] M. Bernyk, S. Ternova: Last place can prove shameful // Your health № 28 (855) from 22-28 July 2006 http://vz.kiev.ua/med/28-06/2.shtml

year. This level is double that of the average around the country. Among the causes of death were breathing difficulties, injuries and accidents with the latter highlighting considerable problems in the organization of medical care for mothers and their babies. The overwhelming majority of cases where infants died between 28 days and one year were registered in rural areas (70%). This indicates inadequate work in medical and social preventive care and regular medical check-ups of young children in rural areas. In the first month of life, the main cause of death is congenital defects which were not detected by a scan. In maternity wards in the region there were 5 deaths in the second and third weeks of life, which suggests that the stages for organization of medical care for newborn babies were not being observed properly. There are also problems with equipment in maternity wards in the districts and cities of the region. Only 8 of the 23 wards have respiratory equipment for newborns babies; there were no well rooms in three maternity wards with between 150 and 170 births a year; only 8 hospitals had foetal monitoring equipment. There were problems in the region with finding neonatal specialists and paediatricians, particularly in small and far-off districts. Overall in the region the following posts were vacant: 153 paediatrician jobs; 49 – midwife-gynaecologists; 15 – neonatal specialists and 21 child anaesthetists. In district treatment and preventive medicine institutions there were shortcomings in the system for monitoring pregnancies these concerning the comprehensiveness and quality of examination, consultation, treatment, timely hospitalization according to the protocols and levels for medical assistance.[11]

Another indicator is also showing an increase each year, this being the number of women dying during childbirth. For example, in the Luhansk region where another special committee from the Ministry of Health worked, it was found that in 5 months of 2006 the indicator for maternal mortality was 50.7% (4 women died, as against one death in 2005). This suggests serious failings in the organization and quality of medical care provided to pregnant women, women who are giving birth or who have done so recently, both in-patients and those treated on an outpatient basis.

There are virtually identical problems in every Ukrainian region, indicating the scale of the problems which Ukraine must address. Statistical data indirectly shows also that at the local level there is concealment of actual data or manipulation of the figures (for example, by «slipping» infants into a different weight group, weighing them incorrectly, etc). There are also such obvious problems as inadequate professional training of staff on health care for mothers and their babies, staff shortages, especially in rural areas, a lack of a systematic approach to resolving the problems in the field and providing for its material and technical needs. Instead of real plans, vague programmes are put forward, general methods instead of a specific analysis of the shortcomings in order to immediately address them, and abstract noises on the subject of why it is all bad. The instalment of new technology is limping along painfully, while the heads of health care bodies cannot find time to cooperate with the local authorities and bodies of local self-government, or with the law enforcement agencies. It needs to be recognized that the problem of child mortality has already ceased to be a merely medical problem.

Rural medicine, despite certain efforts by the government to improve the situation, remains in a dire state. There are neither the specialists, nor medicines, nor the necessary technical and material base. According to information from the Ministry of Health, at present there are almost 300 villages with populations of between 500 and 1,000 people which don't have hospitals at all. According to the Minister of Health Y. Polyachenko, over the last 10 years nothing was done for rural doctors and the consequence now is a huge shortage of qualified staff in these areas.[12] Mr Polyachenko said that the Ministry was attempting to conclude agreements with the local authorities. The plan was that the Ministry would take responsibility for training staff, finding equipment, etc, but the local authorities would have to agree to provide proper living and working conditions, the relevant benefits, etc.

Another important problem is the fact that over the last year the market for commercial donors has become much more active. The Law «On transplants of organs and other human anatomical material» adopted in 1999 obliges doctors to get permission from relatives to use the organs of a

[11] Ibid
[12] The Minister of Health is convinced that rural medicine has a future http://www.podrobnosti.ua/health/2006/01/21/279554.html

person who has died. As a result, Ukraine experienced a shortage in organs for transplants. For example, estimates from the Coordination Centre for Medical Transplants of the Ministry of Health suggest that 1 thousand people in Ukraine may need kidney transplants while there are no more than one hundred such operations a year. However in 2006 there was an unexpected doubling in the number of transplants. Doctors explain it as being an increase in the number of organ transplants from relatives however the reason could lie in a more active market of commercial donors. It should be noted that in Ukraine only relatives or spouses can legally be donors. Criminal liability is imposed in the Criminal Code for trafficking in human organs, with a possible sentence of up to 5 years imprisonment, however there are many in Ukraine whom this does not stop, and you can see a lot of advertisements offering human organs for sale.

Medical transplant operations are carried out in four centres: Kyiv, Zaporizhya, Donetsk and Odessa. Each potential donor is checked out by specialists from the Bioethics Committee. It's not possible to carry out such operations in makeshift conditions so it would be very difficult for donors doing it for money to avoid such checks. It is much harder, however, to keep tabs on people who decide to sell their organs abroad. The public authorities prefer not to notice the increase in the illegal market in human organs, while the Prosecutor and Police say that nobody is specifically dealing with trafficking in organs. There have been no criminal investigations instigated over possible cases.[13]

Against a background of reduced social support and declining public health care, Ukraine is suffering two major-scale epidemics – HIV-infection and tuberculosis. According to WHO, Ukraine has one of the highest rates of HIV-infection in the world.

In the majority of regions the number of people infected, suffering from or having died of AIDS is on the increase. During six months of 2006 8,058 new cases of HIV-infection were recorded among Ukrainian nationals, and 10 among nationals of other countries. 2,393 people living with HIV were diagnosed as having AIDS, including 61 children under the age of 14. Despite the wide-scale introduction of antiretroviral treatment, there were 1,140 deaths from AIDS, including 17 children. As of 1 July 2006, there were 67 974 people officially registered as having the HIV infection. . This equals 144.3 people living with HIV per 100 thousand head of population (On 01.01.05 this was 133.5 per 100 thousand). In more than 6 thousand cases (6,297) the HIV infection has developed into AIDS.[14]

The highest rates are registered in the following regions: Dnipropetrovsk (356.5 per100 thousand head of population), Odessa (347.5), Donetsk (319.4), Mykolaiv (298,2) , and in Sevastopol (259,2) and the Crimea (221,3). These regions also have the highest number of new cases of HIV-infection.

Over the last six months the infection was contracted in the following ways: parenteral (in general through injecting drugs) – 45,3 %; through sexual intercourse – 35,4 %, (predominantly heterosexual)l from mother to child – 16,4 %, not identified – 4,5 %. In the first two quarters of 2006 3 649 injecting drug users were registered, this being 45.3 % of all those officially registered as living with HIV in Ukraine.

According to monitoring, over six months of 2006 1,285,402 tests for HIV antibodies were carried out in Ukraine, with 15,380 people being identified as HIV-positive (1.2%). The number of people identified as having the HIV infection among pregnant women and potential donors is on the increase. Under the code 108 (donors), 542 people were infected (1.13%) and under 109 (pregnant) – 1,577 women (0.31%)[15]

The situation with the spread of tuberculosis is no less serious. During Government Day in the Verkhovna Rada, the Deputy Minister of Health stated that at the present time there are 84.1 people per 100 thousand of population suffering from tuberculosis.[16]

[13] Trafficking in human organs is booming in Ukraine http://korrespondent.net/main/182831/
[14] Statistics from the International HIV/AIDS Alliance in Ukraine:
http://www.aidsalliance.kiev.ua/cgi-bin/index.cgi?url=/ua/library/statistics/index.htm
[15] Ibid
[16] Government Day in the Verkhovna Rada, 14 March 2006
http://portal.rada.gov.ua/control/uk/publish/article/news_left?art_id=69096&cat_id=46667

According to Kirsten Miskinis, Medical Adviser on fighting tuberculosis for the World Health Organization in Ukraine, the main reason for the epidemic is the lack of sufficient government spending to support the system for diagnosing the disease adopted back in Soviet times. At present in Ukraine only the first steps have been taken towards introducing the world-recognized strategy for fighting tuberculosis. This consists of 5 elements: government support; programmes for the effective identification of cases of the disease; standard short-term chemotherapy; checking for the regular availability of medical remedies; registration and reporting. This treatment strategy makes it possible to effectively fight with the problems with the smallest amounts of funding. However there are also a number of problems which can only be solved through a systematic approach. One of the most difficult of these is the lack of a system enabling the identification and treatment of tuberculosis of particularly serious forms, – drug-resistant tuberculosis. More than 10 percent of those with the disease in Ukraine have specifically this drug-resistant form. The lack of a system for fighting drug-resistant tuberculosis is one of the major causes of the epidemic in Ukraine. Patients with this form which at the present time is practically untreatable, not only themselves cannot get better but continue infecting others.

The Verkhovna Rada Committee on health care, mother and child in 2006 warned that the government has lost control over the spread of tuberculosis. In conditions of political instability, where each year or even more often governments change at the highest level of power, virtually nobody has been taking responsibility for coordinating the anti-tuberculosis work at government level. Major contributory factors for the worsening situation in Ukraine are the lack of a clear strategy for combating tuberculosis at the highest levels, the failure to understand the social essence of the disease, as well as indecisiveness and lack of consistent policy in carrying out the relevant measures.[17]

During the assessment of the present situation with regard to tuberculosis, it was stressed that since the epidemic began no government in Ukraine has proved capable of having any real impact. This can be seen in the comparative figures on illness and death from tuberculosis which are becoming worse every year. Over the last ten years during which the disease has taken on epidemic proportions, the numbers have almost doubled and now stand at over 80 cases per 100 thousand head of population (at the beginning of the epidemic the figure was 50). More than half a million people are presently on the registers of tuberculosis treatment units. This number rises by almost 40 thousand every year. The number of people dying of tuberculosis has increased by approximately 11 тисяч осіб на рік. The number of patients whose illnesses is diagnosed at a late stage is rising rapidly. More and more pathogens of the disease are appearing and cases where it is resistant to some drugs and more serious or neglected forms of tuberculosis.

A very worrying trend is that young able-bodied people and children are forming a significant number of those with tuberculosis. All of the above points to a low level of early diagnosis and treatment of patients at the beginning stages of tuberculosis when the diseases is most easily dealt with.

Criticism was also made of the central and local authorities for failure to act, for passiveness in implementing both general and special measures aimed at combating tuberculosis. Figures were given reflecting the situation in institutions which are supposed to fight this disease. Despite the rapid increase in number of cases of tuberculosis, from 1990 – 2004 the network of tuberculosis treatment units and other specific medical institutions and their number of beds had been reduced by a third. 61 tuberculosis treatment units with 17 thousand places had been closed. Low salaries, regular staff redundancies, the lack of adequate mechanisms to stimulate work and social protection of medical staff of such units had led to a considerable staffing shortage in the tuberculosis treatment service which is at present only 40 percent staffed, with more than half of these being people of retirement age. Work-related illnesses among employees of this service had become 20 times higher over the period in question.[18]

It must, finally, be noted that audits carried out over the last five years by the Accounting Chamber have unfailingly identified one and the same typical irregularities in the use of government

[17] Ibid
[18] Government Day in the Verkhovna Rada, 14 March 2006
http://portal.rada.gov.ua/control/uk/publish/article/news_left?art_id=69096&cat_id=46667

funding allocated for the implementation of the government programme on combating tuberculosis. Most money has been used inefficiently and not as allocated.

It is impossible to predict how the situation will develop in the future. It is also unclear whether the adoption by the Verkhovna Rada at the beginning of 2007 of a nationwide programme for countering tuberculosis for 2007-2012 will remain merely declarative words, as have previous programmes, or whether on the contrary this will provide the impetus to achieve a gradual improvement in the situation. In any case one can observe an acknowledgement that this is a problem of national importance and one on which the lives of many Ukrainians depends.

Below we review some of the issues of this general overview in more detail.

2. REVIEW OF LEGISLATION

As mentioned earlier, the main basis for the legal system is the Ukrainian Constitution which defines the approach for formulating policy in all spheres, including that of health care. It declares human life and health to be of the highest value and states in Article 49 that «everyone has the right to health protection, medical care and health insurance... The State creates conditions for effective medical service accessible to all citizens. State and communal health care institution provide medical care free of charge; the existing network of such institutions shall not be reduced.»

The Constitution, however, does not define what is meant by medical care, nor does it indicate what kind of health insurance is meant.

The main document providing legal regulation for health care in Ukraine is the Law «On the fundamental principles of health care legislation in Ukraine», adopted by the Verkhovna Rada in 1992. This law sets out the organizational, professional, legal, economic and social principles for health care.

Most normative legal acts have been drawn up to develop the provisions of this base law.

In the years since independence, a national normative legal base for the health care system including approximately 900 normative legal acts has been created. These acts per force involve norms from many spheres of law, including civil, criminal, financial, labour and administrative law, social security, etc.

Six laws pertaining to health care were passed during the first year following Independence. Among the first were «On the status and social protection of people who suffered as a result of the Chernobyl Disaster»; «On the Basic Principles of social protection for people with disabilities in Ukraine» and «On protection of the natural environment». A law of direct effect was passed «On prevention of AIDS and the social protection of the population» which defined the procedure for legal regulation of issues related to the spread of AIDS in accordance with norms of international law and the recommendations of the World Health Organization. Over the following years a number of amendments were made to this law. A Presidential Instruction approved provisions for creating a National Committee for Fighting AIDS, and in 2000 a Presidential Decree «On urgent measures for preventing the spread of HIV/AIDS» was passed, as well as a number of Cabinet of Ministers Resolutions. In 1999 a «Programme for preventive measures against AIDS and drug addiction for 1999-2000» was passed, and in 2001 a Government Committee on preventive measures against HIV-infection and AIDS was created and is still functioning now.

The problem of social protection for those who suffered as a result of the Chernobyl Disaster remained an issue, and in 1992-1993 supplements were adopted to the Law «On the status and social protection of people who suffered as a result of the Chernobyl Disaster», with a number of Presidential Decrees and Cabinet of Ministers Resolutions being passed. In 1997 the Verkhovna Rada returned to this issue, passing the Law «On the creation of a Fund for measures on liquidating the consequences of the Chernobyl Disaster and social protection of the population». In 1998 the Law «On protection from ionizing radiation» was passed.

From 1992 a number of laws pertaining to the demographic situation, and protection of mother and child were passed. These included: «On government help for families with children» (1992), «On the protection of childhood» (2001) and numerous Presidential Decrees on urgent measures

for assistance to families with many children, and improving mothers' and children's health. There were also several Resolutions from the Cabinet of Ministers, for example, on protecting families with disabled or sick children, as well as on increasing social protection and material provisions for orphans and children deprived of parental care.

Various Resolutions of the Cabinet of Ministers adopted national programmes for improving the position of women, the family, protection of the mother and child and family planning. In 1996 a National Programme «Children of Ukraine» was passed, and in 1997 a National Fund for the Social Protection of Mothers and children» «Ukraine for children» was created. In 2006 the Cabinet of Ministers passed a resolution «On approving the Government Programme «Child Oncology» for 2006-2010».

In 1994 the Law «On ensuring the sanitary and epidemiological well-being of the population» came into force. This law regulates relations arising in this sphere; stipulates the relevant rights and duties of the public authorities, enterprises, institutions and individuals; establishes the rules of procedure for the organization of the State sanitary and epidemiological service as well as for State sanitary and epidemiological supervision. In connection with the adoption of this law, In 2000 the Verkhovna Rada passed amendments to some legislative acts, specifically to the Laws «On protection of the natural environment» (1991); «On information» (1992.); «On consumer cooperation» (1992), to the Cabinet of Ministers Edict «On government supervision over adherence to standards, norms and rules, and liability for their violation» (1993); to the Law «On environmental impact assessments» (1995) and other normative legal acts. To deal with the possibility of an epidemic or grave consequences of infectious diseases, the Law «On protection of the population from infectious diseases» was passed in 2001.

In the light of the Law «On information», the issue of patients' right to receive medical information came to the fore. This was reflected in the Judgment passed down by the Constitutional Court regarding the official interpretation of Articles 3, 23, 31, 47, 48 of the Law «On information» and Article 12 of the Law «On the prosecutor's office» (the case of K.H. Ustimenko No. 5-ep from 30.10.1997).

The grounds for the submission were the lack of clarity in the application of the above-listed norms by courts of general jurisdiction leading to a violation of constitutional rights.

From 1988-1990 Mr Ustimenko had, at the application of the administration of the Dnipropetrovsk railway technical college, been on the psychiatric register of the Dnipropetrovsk psycho-neurological clinic. The applicant who had learned of this in July 1990 considered that it restricted his chances of finding work and that it had caused him moral and material damages. In order to seek compensation through civil proceedings, he turned to the Chief Doctor of the clinic demanding to know who had placed him on the register, when and on what grounds; who had been informed of this; by whom, when and on what grounds he had been taken off the register; whether the actions of the psychiatrists in 1988-1990 in limiting his work options had been lawful and who was responsible for the material losses sustained. The Chief Doctor refused to provide the information referring to the confidentiality of doctors' records. Over almost seven years Mr Ustimenko's cases was on several occasions with quite different outcomes reviewed by courts of general jurisdiction at all levels. With the final judgment, the applicant's demands were partially met. He received a copy of his medical card and some other information which, however, he did not regard as sufficient.

On 27 November 1992, citing Article 37 of the Law «On information», but without explaining his motives, the Deputy Prosecutor for the Dnipropetrovsk region refused to provide Mr Ustimenko with testimony in the possession of the prosecutor's office regarding the applicant's state of health. Mr Ustimenko appealed the Prosecutor's refusal to provide the information in court. The court refused to consider the claim on the grounds that a citizen may appeal against the actions of the prosecutor's office only in cases provided for by the Criminal Procedure Code. These civil suits continued from 1993 – 1996, reaching the Supreme Court.

Having reviewed the case, the Constitutional Court issued a judgment which included the following: Article 23 § 4 of the Law «On information» must be understood as prohibiting not only the collection, but also the storage, use and dissemination of confidential information about an individual without the person's prior consent, except in legally established cases and only in the interests of national security,

economic well-being and human rights and freedoms; Confidential information shall include personal information (education, marital status, religion, state of health, date and place of birth, property owned, and other personal data; Article 23 § 5 of the same Law must be understood as meaning that every person shall have the right to become familiar with information on him- or herself collected by public authorities, bodies of local self-government, institutions and organizations if this information is not a state or other legally protected secret.

«In cases where medical information is not provided or is deliberately concealed from a patient, his or her family or legal representative, they may appeal against the action or inaction of the doctor directly in court, or should they choose, to the medical establishment or to an office of the Ministry of Health». The judgment also declared Article 12 § 4 of the Law «On the prosecutor's office» unconstitutional in only allowing appeals against prosecutor's decisions in circumstances set out in that law, since exceptions to constitutional norms are established by the Constitution itself and not by other normative acts.

In 2006 the problem of receiving information about ones state of health remained an issue, most often when dealing with criminal investigations.

One can cite the example of Skrypnyk, a 14-year-old boy who lodged an application with the prosecutor's office to have criminal charges brought against police officers who he alleged had inflicted bodily injuries. Staff of the district hospital which had provided first aid care refused to provide the boy's legal representative with a copy of the information on the boy's medical file. The information gave details about the bodily injuries and was vital for getting a criminal investigation launched. The hospital staff claimed that the record had been lost. This is not the first instance where hospital personnel, having found out the patient received injuries in a police station, refuse to give documentary records of injuries sustained.

1995 saw the adoption of the Law «On donor blood and its components» which regulates this important area of modern medical practice and provides measures for organizing blood donors, etc. In 1999 amendments were made to this law.

In that same year the Law «On the use in Ukraine of narcotic substances and psychotropic means, their analogues and precursors, and abuse of these» came into force., together with a Law on measures to combat the circulation and abuse of such substances.

In 1996 parliament passed a Law «On medication», this regulating the creation, registration, production, quality control, use and sale of medicines. The Law also defines the rights and duties of businesses, institutions and organizations, as well as of individuals, and the powers in this area of the public authorities. This Law was later that year supplemented through a number of resolutions of the Cabinet of Ministers, concerning control over immunobiological medication; procedure for purchasing medication; procedure regarding the use of narcotic substances, psychotropic means and precursors. Four more Cabinet of Ministers Resolutions were passed in 1997 on procedure for the issue of certificates on importing and exporting narcotic substances, psychotropic means and precursors; on approving rules for retail of medicines; on government control of the quality of medicines and on the creation of a State joint stock company «Medicine of Ukraine».

The enormous importance of medication is reflected in further legislative regulation of related issues. This included amendments to the Law «On the use in Ukraine of narcotic substances and psychotropic means, their analogues and precursors, and abuse of these»; the Presidential Decree from 1999 «On improving government control over the quality and safety of food items, medicines and production for medical use», as well as two Resolutions of the Cabinet of Ministers on procedure for activities linked with the use of narcotic substances, psychotropic means and precursors, and a list of these, passed in 1999, 2000 and 2001.

However, according to practising doctors, the list includes medication about which it would be excessive to use the term «psychotropic effect». This applies first and foremost to the group of tranquillisers included in № 2 Table IV of the List of narcotic substances, psychotropic means and precursors. These are widely used in treating common illnesses. The second problem is that the lack of standardization of the rules and instructions for use of «legally» designated medicines of this group at the intergovernmental level sometimes leads to accusations of illegally bringing psychotropic substances into Ukraine.

A musician from Moscow B. was held for more than two months in SIZO [pre-trial detention centre] No. 27 in Kharkiv. He was accused of smuggling and possession of drugs on the grounds that when cross-

ing the border he hadn't declared his medication (Phenazepam and Klonazepam). He hadn't known and couldn't have foreseen that medication which had been prescribed by a doctor and purchased in a Moscow chemist was listed in Ukraine as «psychotropic substances». In the information provided with the medicine there is not a word about this. B. was suffering from asthenodepressive syndrome after a serious operation and he sometimes got panic attacks. Thanks to the medication, however, his condition had been improving and he and his wife had decided to take a holiday in the Crimea. Instead, he ended up in a SIZO. At the present time B. is free, however the criminal case launched against him is being examined by the Derhachivsky District Court.

Muscovite architect G. ended up facing criminal prosecution in Ukraine when 27 tablets of the same Phenazepam was found crossing the border.

In 1996 the provision of medical services for a fee was regulated at a legislative level via the Resolution of the Cabinet of Ministers «On approving a list of paid services provided in government health care institutions and higher medical education institutes». Some provisions of the Resolution were however declared unconstitutional in Judgment No. 15-rp/98 of the Constitutional Court (25.11.98) and the list was reduced.

A second judgment from the Constitutional Court on an official interpretation of paragraph three of Article 49 of the Constitution: «State and communal health care institution provide medical care free of charge» was handed down on 29 May 2002 (No. 10-rp/2002)

In 1997 and 1998 a number of laws were passed including: «On charitable work and charitable organizations»; «On declaring null and void some legislative acts of Ukraine on forced treatment and labour re-education of drug addicts»; «The Fundamental principles of legislation on mandatory State social insurance»; «On human organ transplants and other anatomic material». In 2004 parliament passed a Law «On banning reproductive human cloning».

In view of the serious rise in the number of cases of tuberculosis in Ukraine, in 1999 resolutions were passed on comprehensive measures for combating tuberculosis, and specifically the Presidential Decree «On urgent measures for combating tuberculosis» (2000), aimed at improving specialized medical care, the introduction of modern medical technologies, comprehensive preventive medicine and treatment of tuberculosis and its complications.

19 Resolutions of the Cabinet of Ministers were passed in 1999. They pertained to the possible creation of a single government system of control over radiation; comprehensive programmes for radioactive waste; on procedure for protecting the population against ionizing radiation. Others were over the issue of domestic production of insulin; control over the circulation of imported alcoholic beverages; allocating funds for providing medicine for veterans of the War; the creation of a Council on environmental problems of the Dnipro River basin and others. In 2000 the President issued a Decree approving the document «On a Development Strategy for public health care in Ukraine».

In order to regulate economic relations in the field of health care, parliament passed in 2000 a Law «On procurement of goods, work and services with Government funding» intended to create a competitive market, ensure transparency in the procurement procedure and achieve optimum rational use of Government funding. The list includes medical services. The law was aimed at opening up opportunities for competition on a tender basis for funding from State and local budgets between the State, communal and private sectors of health care.

In order to develop new organizational forms and economic mechanisms for providing the public with medical care, a Presidential Decree was passed in 2000 «On experimenting in Kyiv and the Kyiv region on the introduction of mandatory social health insurance».

The Cabinet of Ministers Resolutions «On comprehensive measures for introducing a family medicine system of health care» (2000) and «On the creation of an inter-departmental coordination council under the Ministry of Health on inter-branch cooperation among health care institutions» (2000) were aimed at enhancing the quality and effectiveness of medical services, bringing qualified medical and sanitary assistance closer to each family, as well as rational use of health care resources. However ineffective and irrational use of limited budgetary funds remains a major problem. Approximately 80% of all funding is spent on maintaining and servicing costly specialized inpatient medical care which, as mentioned, is in marked contrast to most countries where inpatient treat-

ment makes up around 50% of spending, while up to 30% is channelled into primary health care, working on the principle of family medicine.

Cabinet of Ministers Resolution № 1465 from 27.09.2000 approved procedure for carrying out mandatory preliminary and periodic medical check ups and a list of psychiatric counter-indicators for carrying out certain types of activity (work, professions and services) which can pose a direct threat for a person carrying out such activities or those around him or her.

In 2001 a Law was passed «On combating tuberculosis». It defines the legal, organizational and financial principles of activity aimed at preventing the spread of tuberculosis of the authorities, bodies of local self-government, enterprises, institutions and organizations regardless of their form of property, type of activity or economic management, as well as individuals engaged in business activities. It stipulates the rights, duties and liabilities of legal entities and individuals in fighting tuberculosis.

The Law «On the protection of childhood» (2001) declares the protection of children to be a strategic national priority aimed at safeguarding the right of the child to life, health care, education, social protection and multi-faceted development.

However such lofty principles do not always coincide with practical application. On 18 August 2006 Olha R., in her eighth month of pregnancy, was detained by officers of the Kyivsky district police station in Kharkiv and taken to the police station. On 20 August she gave birth in the cell-like accommodation in which she was being held in the absence of any medical assistance. The police twice called for an ambulance but the doctors saw no grounds for taking Olha to hospital. Olha says that the child received an injury to the head during the labour. Thank goodness both mother and child are alive. Olha also alleges that she was beaten in the police station despite being pregnant.

The Kyivsky District Prosecutor did not, however, find Olha's allegations regarding physical and psychological pressure to be justified, nor did they see any elements of the crime of failure by a medical worker to provide help to a sick person. The Prosecutor's decision states, for example: «R was looked at by doctors with the following notes having been made ... hospitalization in case of contractions at an interview of 10-15 minutes or if the patient's waters break.»

Among Cabinet of Ministers Resolutions passed in 2001, the most closely linked to health care were those «On approving procedure for carrying out activities connected with the use of narcotic substances, psychotropic means and precursors in treatment or preventive medicine institutions»; «Some issues on implementing the Law «On State social help for poor families». The relevant Cabinet of Ministers Resolutions approved the makeup of a Government commission on preventive measures against HIV/AIDS, with measures defined for protecting the population and territory from manmade emergences or natural disasters. Some questions regarding registration, register and reporting on infectious illnesses were addressed

Certain aspects of the right to health care protection are regulated by the Civil Code which came into force on 1 September 2005. Chapter 21 of this Code covers non-property rights, and some of the articles here arouse doubts.

Article 281.6 «The right to life» states that pregnancy *within twelve weeks may be terminated at the woman's wish. In cases established by legislation it may be terminated from 12 to 22 weeks.* Up to 2004, pregnancy could be terminated on medical grounds up to 28 weeks. Under this item of the Article the foetus is regarded as a child from the 22nd week. This means that even in the event of a serious pathology or complications with the health of the pregnant woman, doctors will not agree to an abortion after 22 weeks. In our circumstances this can often be against the health interests of the woman. Very often the technology used for examining a pregnant woman is outdated, especially in district hospitals and a foetal abnormality is often only discovered after the 22nd week when the woman may already not terminate the pregnancy. This can lead to tragic consequences.

Ms M. approached KHPG. In the 23rd week of pregnancy an ultrasound scan detected that the foetus had a serious abnormality of the blood vessels to the brain. The woman was also found to have a cytomegalovirus (CMV) infection. Despite these complications, the doctor of the district hospital in charge of supervising the pregnancy did not even inform her of the risks, let alone consider terminating

the pregnancy. The baby was born sickly and despite the efforts of the neonatal specialists, died of an abnormality of the blood vessels to the brain and cytomegalovirus meningo-encyphalitis.

Article 284 of the Civil Code is no less dubious. Paragraph 2 of this Article states that *«a person who has reached the age of fourteen and who seeks medical assistance has the right to choose a doctor and the methods of treatment.»* Paragraph 3 then goes on to state that: *«medical assistance is provided to a person who has reached the age of fourteen at his or her consent»*. It is clear that at 14, the majority of teenagers are not able to realistically assess their state of heath, nor the professional level of the doctor or the need to apply particular forms of treatment. In our view, up to 18 such complicated issues as the choice of doctor or method of treatment should be made by the legal representatives of the teenager, the parents or those representing them, those treating him or her, adoptive parents, and so forth. The teenager should have the right of consultation, and where there are divergent views, where it is an issue of normal, not urgent assistance, the doctor should choose what is appropriate in the specific instance but must inform the district board of trustees.

In our view Article 285 of the Civil Code can infringe human rights. Paragraph three of this Article states: *«If information about the illness of a person may worsen his/her state of health or the state of health of persons indicated by paragraph two of this Article, or hinder the process of treatment, medical workers may give incomplete information about the state of health of the person and restrict access to certain medical documents»*.

We mentioned earlier the interpretation of the Constitutional Court of Article 23 of the Law «On information». The Court's judgment, which is binding on all and must be considered when passing any legal norms, laws and resolutions, prohibited the concealment of any information by medical personnel or institutions from patients. There may be no exceptions which means that Article 285 § 3 of the Civil Code needs to be changed.

The need for major reform of the health care system is indisputable. Some of the fundamental concepts for development were outlined in the President's Decree of 2005 «On urgent measures for reforming the health care system» and in the proposals of the Ministry of Health to the draft recommendations of parliamentary hearings on the problems in providing health care services and ways of overcoming them in 2005.19.

The problems are highlighted by a number of studies. The State Committee of Statistics carried out a survey to ascertain the level of access the public have to health care, medicines and other medical goods, and to also find out how people assess their level of health and the prevalence of ill-health.20 In October 2006 10.5 thousand households throughout the country took part in the survey.

The results showed that the number of those households who reported being unable to satisfy their needs for medical care had risen from 13% in 2005 to 14%. The main reason given for medical services being inaccessible, as in the previous year, was the prohibitive cost for the household of medicines or medical services. Among those with the lowest income, one in six households was unable to receive the medical care they required, against one in seven in 2005. 76%, against 78% in 2005, reported cases where they had not bought medicine because it was too expensive.

Problems remain with access to doctors. In almost half the households where one of the members had not received medical assistance, patients did not have the opportunity to visit a doctor. In four out of five of such cases, the respondents explained this as being due to the high cost of the services. 11% mentioned the lack of the particular type of medical specialist (in rural areas 18%). One in ten said that the waiting list was too long.

Nine out of ten respondents needing medical equipment, a dentist, prosthesis, or medical examinations, had not been able to afford the expense.

Every sixth household where members had needed but not received medical assistance reported cases where the needed treatment had not been available in the hospital. Nine out of ten also mentioned the cost as the reason for not having the treatment. Among people being treated in hospital, 90% (against 89% in 2005) had taken medicine with them to the hospital; 79% (against

[19] http://moz.gov.ua/
[20] http://www.ukrstat.gov.ua/

77%) – food; 61% (as in the previous survey) – bed linen. The percentage of those who had taken none of the above with them remained the same as the previous year – 6%.

Every fourteenth UAH (against every tenth from January – September 2005) spent by the households surveyed on health care services was for informal services (bribes, remuneration for doctors working without the legal backup – licenses etc).

The results of the survey suggest that overall in Ukraine 56.0% of respondents are unable to receive proper medical services which is 0.7% less than for the previous survey. More than half of the respondents said that their state of health was satisfactory (57.7%). 17.7% said that they had a chronic medical condition requiring regular medical care.

The opportunity to receive medical care where one lives is a major component of social safety for individuals, the region and the country as a whole. 56.0% (against 56.7% in 2005) said that they were able to receive such services where they lived. Table 1 shows the clear dependence of availability of medical services on where people live.

Table 1. Assessment of the ability to receive medical care at ones place of residence (in percentages)

Are you able to receive the necessary medical care where you live?		
	Yes	No
Urban areas		
2003	42,8	57,2
2004	51,3	48,7
2006	50,4	49,6
Rural areas		
2003	19,5	80,5
2004	21,4	78,6
2006	24,4	75,6

The results showed that despite the fact that the majority of medical services are officially still free of charge the main problem in access to health care was in fact not being able to afford it. As a result of the generally low level of income in the country, medical services remain inaccessible to a significant part of the population. This problem is exacerbated by the shortcomings in he health care system limiting access for many parts of the public, especially those who live a considerable distance from large cities.

3. PATIENTS' RIGHTS

Ukraine's Periodic Report on its implementation of the International Covenant on Economic, Social and Cultural Rights:21 states: «The Fundamental Principles are founded on the main legal norms of the European model, in particular, with respect to the duty to provide medical information to the patient (Article 39); the right of the patient to freely choose his or her doctor and health care institution (Articles 34, 38); the procedure and conditions for consenting to the use of prophylactic, diagnostic and treatment measures (Articles 42, 44), medical confidentiality (Article 40) and consent to medical intervention (Article 43)».

If we take from the Fundamental Principles [of health care legislation in Ukraine] those Articles which refer to patients' rights we find the following picture:

- A doctor may be chosen directly by the patient or appointed by the head of the health care institution or a department of it (Article 34);
- The patient is entitled to ask for the doctor to be changed (Article 34);

[21] The UN Economic and Social Council: Implementation of the International Covenant on Economic, Social and Cultural Rights, Fifth Periodic Reports presented by State parties under Articles 16 and 17 of the Covenant. Ukraine.

♦ Each patient is entitled to free choice of doctor if the latter can offer his or her services (Article 38);

♦ Each patient is entitled, if this is justified by his or her condition, to be admitted to any State-run treatment or preventive medicine establishment at his or her choice if this establishment is able to provide the relevant treatment (Article 38);

♦ The doctor is obliged to explain to his or her patient in an understandable form the state of the patient's health, the purpose of the proposed examination or treatment, the prognosis for the possible development of the illness, including risk to life and health (Article 39);

♦ The patient is entitled to read his or her medical files and other documents which may be used for further treatment. In particular cases where full information could be harmful to the patient's health, the doctor may restrict this. In such cases he or she shall inform members of the patient's family or legal representative bearing in mind the patient's interests. The doctor shall behave in the same manner where a patient is unconscious (Article 39);

♦ Medical personnel and other persons who in the course of carrying out their professional duties have learned of the illness, medical examination, check up and their results, intimate or family aspects of a patient's life do not have the right to divulge this information, with the exception of cases envisaged by legislative acts (Article 40);

♦ In using confidential medical information in the educational process, in scientific research works, including in cases where these are published, as well as in special literature, the patient's anonymity must be ensured (Article 40);

♦ During a period of illness preventing people from working, they shall be entitled to sick leave with payment according to legally established procedure of social security benefit (Article 41);

♦ The consent of a mentally fit patient is needed for applying diagnostic or prophylactic measures or treatment. In emergencies when there is a real risk to the patient's life, the consent of the patient or his / her legal representative to medical intervention is not required (Article 43).

The level of public awareness about patients' rights can be considered rather low, and the question of such rights is not seen as an issue for most people. 20% of those surveyed in a recent sociological study were not interested in this area at all.22. In general respondents did not believe that patients' rights were observed in health care establishments. They assessed the situation in private establishments as a bit better than in State institutions. Every fifth respondent (22%) said that they had encountered infringements of their rights when turning to State medical establishments. The only right which the overwhelming majority of respondents was confident of was the right to receive medical care (67%). As far as other rights were concerned, the respondents found these observed in less than 50% of cases, while the right to compensation, they believed, was effectively not safeguarded in Ukraine.

The right to maintenance of quality standards for medical services in State medical establishments is very often infringed through the lack of medicine, medical equipment and instruments, as well as poor general conditions (36-49%).

The right to privacy and confidentiality is infringed, although only 7% of those surveyed mentioned this. In cases involving certain illnesses, this percentage is considerably higher. In the first instance there is widespread infringement of the right to confidentiality in relation to patients with socially dangerous illnesses (HIV/AIDS, tuberculosis, hepatitis).

Among respondents whose rights had been infringed, only every fifth person had tried to exercise the right to make a complaint. Most people in this position had already had negative experience of defending their rights: they had received purely formal responses to their complaints (50%); their complaints had been sent from one department to another (43%) or there had been no response at all (34%).

The international medical community has adopted a lot of documents outlining for modern times patients' rights. One of these was the World Medical Association Declaration of Lisbon on the rights of the patient, adopted by the 34th World Medical Assembly (Lisbon, Portugal, September/October 1981) and amended by the 47th WMA General Assembly, Bali, Indonesia, September 1995. We would also mention the Declaration on the Promotion of Patients' Rights in Europe (the

[22] The results of a sociological study: «Public opinion as an instrument for monitoring the observance of patients' rights in Ukraine», the Centre Socioconsulting, with the support of the International Renaissance Foundation

European Consultation on the Rights of Patients, held in Amsterdam on 28-30 March 1994 under the auspices of the WHO Regional Office for Europe (WHO-EURO).

If one compares these documents with the Fundamental Principles, it can be concluded that overall the fundamental rights of patients have been reflected in Ukraine's legislation and that the latter in this area complies with international requirements. However the implementation in practice of the requirements and standards of domestic legislation and international documents is a very big problem.

Most attention, in our view, is needed to the following points of the Declaration on the Promotion of Patients' Rights in Europe

2.1 Information about health services and how best to use them is to be made available to the public in order to benefit all those concerned.

2.2 Patients have the right to be fully informed about their health status, including the medical facts about their condition; about the proposed medical procedures, together with the potential risks and benefits of each procedure; about alternatives to the proposed procedures, including the effect of non-treatment; and about the diagnosis, prognosis and progress of treatment.

2.7 Patients should have the possibility of obtaining a second opinion.

3.1 The informed consent of the patients is a prerequisite for any medical intervention. (also 3.2-3.10 of the Declaration).

4.4 Patients have the right of access to their medical files and technical records and to any other files and records pertaining to their diagnosis, treatment and care and to receive a copy of their own files and records or parts thereof. Such access excludes data concerning third parties.

4.5 Patients have the right to require the correction, completion, deletion, clarification and/or updating of personal and medical data concerning them which are inaccurate, incomplete, ambiguous or outdated, or which are not relevant to the purposes of diagnosis, treatment and care.

6.1. The exercise of the rights set forth in this document implies that appropriate means are established for this purpose.

6.5 Patients must have access to such information and advice which will enable them to exercise the rights set forth in this document. Where patients feel that their rights have not been respected they should be able to lodge a complaint. In addition to recourse to the courts, there should be independent mechanisms at institutional and other levels to facilitate the processes of lodging, mediating and adjudicating complaints. These mechanisms would, inter alia, ensure that information relating to complaints procedures was available to patients and that an independent person was available and accessible to them for consultation regarding the most appropriate course of action to take. These mechanisms should further ensure that, where necessary, assistance and advocacy on behalf of the patient would be made available. Patients have the right to have their complaints examined and dealt with in a thorough, just, effective and prompt way and to be informed about their outcome.

The Declaration on the Promotion of Patients' Rights in Europe therefore sets in motion the development of independent structures (organizations) intended to defend patients' rights.

WORLD MEDICAL ASSOCIATION DECLARATION OF LISBON ON THE RIGHTS OF THE PATIENT

Adopted by the 34th World Medical Assembly, Lisbon, Portugal, September/October 1981,
and amended by the 47th WMA General Assembly, Bali, Indonesia, September 1995,
and editorially revised at the 171st Council Session, Santiago, Chile, October 2005

Recognising that there may be practical, ethical or legal difficulties, a physician should always act according to his/her conscience and always in the best interest of the patient. The following Declaration represents some of the principal rights which the medical profession seeks to provide to patients.

Whenever legislation or government action denies these rights of the patient, physicians should seek by appropriate means to assure or to restore them.

(a) The patient has the right to choose his physician freely.

(b) The patient has the right to be cared for by a physician who is free to make clinical and ethical judgments without any outside interference.

(c) The patient has the right to accept or to refuse treatment after receiving adequate information.

(d) The patient has the right to expect that his physician will respect the confidential nature of all his medical and personal details.

(e) The patient has the right to die in dignity.

(f) The patient has the right to receive or to decline spiritual and moral comfort including

The experience of the Kharkiv Human Rights Protection Group [KHPG] Public Reception Centre suggests that the public need to receive independent legal consultations and professional assistance in standing up for their right to medical care.

In 2006 1,211 people approached KHPG with various problems. 38 (3.14% of the overall number) directly indicated infringements of their rights in medical establishments. The complaints can be broken down as follows::

- 30 inadequate medical examination;
- 6 the lack of adequate information about their state of health;
- 1 divulgence of information about their state of health;
- 1 inadequate treatment.

However in 27 other cases where the main reason for the complaint was, say, the courts or penal institutions, allegations were also made of poor treatment or inadequate medical examples.

We thus see that most violations were linked with the right to qualified medical assistance (Article 6 of the Fundamental Principles), primary, secondary (specialist) or tertiary (highly-specialized in complex cases – Article 35).

In second place were violations of Article 39 of the Fundamental Principles on the duty and conditions regarding the providing of information.

One complaint was linked with a violation of Article 40 on medical confidentiality.

In implementation of the recommendations of the World Health Organization and the Council of Europe a draft law «On patients' rights», drawn up by National Deputy S. Shevchuk, was tabled in the Verkhovna Rada. The draft law unfortunately had considerable shortcomings and was rejected.

It should be noted that Article 43 of the Fundamental Principles points out the need for the consent of the patient, information in accordance with Article 39 of that law, for the application of diagnostic or prophylactic methods and medical treatment. However the way this «informed consent» is expressed is not defined with the law not stipulating the need for the consent to be in writing. Only in cases where a person refuses to continue treatment and after a once again verbal, explanation about the possible serious consequences, does the doctor have the right (but is not obliged to) receive written confirmation from the patient of his or her refusal to continue the treatment. It is reasonable to ask what and how much the patient was informed and therefore what he or she is actually rejecting. Practice suggests a wide range of possible answers.

4. FEE-PAYING MEDICINE

The first attempt to legalize fees for medical services was made by a Resolution of the Cabinet of Ministers of Ukraine on 17 September 1996. However following a constitutional submission by 66 National Deputies, the Constitutional Court found some of the provisions of this Resolution to be unconstitutional and revoked them (Judgment from 25 November 1998 № 15-rp /98).

With this Judgment the Constitutional Court for the first time gave a definition of «medical care», stating that this includes treatment, prophylactic measures carried out in the case of illness, injuries, childbirth, as well as medical check-ups and some other forms of medical work. The content of the concept of «medical service», close to that of «medical care», remains to the present day undefined not only in normative acts, including in the above-mentioned Resolution, but also in medical literature. The Constitutional Court separated cases where charging fees for medical services was unconstitutional from services which the State cannot take it upon itself to finance in State-run health care establishments (paramedical services), with the latter remaining in the Cabinet of Ministers Resolution.

The Constitutional Court focused its attention of the practice of voluntary donations which should be carried out in the appropriate legal forms and according to the procedure set out in the Law «On charitable work and charitable organizations», and a camouflaged form of payment for medical services directly into the coffers of a State-run health care establishment.

On 29 May 2002 the Constitutional Court returned to the question of providing an official interpretation of the provision in paragraph three of Article 49 of the Constitution – «State and communal health care institutions provide medical care free of charge» on the submission of 53 National Deputies.

What in our view is important in this Judgment is not only the confirmation that free medical care means the absence of the obligation for any citizens to pay for the medical care provided in State and communal health protection institutions, but also the stipulation that this is prior to, during or after the service. «Medical care free of charge» means that no payment may be extracted for such care in any form, whether through cash or not, whether under the guise of «voluntary contributions» to various medical funds, or in the form of mandatory insurance payments (contributions) etc».

This final point warrants particular note. On the basis of its study the Constitutional Court considers that paragraph one of Article 49 of the Constitution ensures the right of each person to heath insurance, that is, not to mandatory, but to voluntary health insurance. With regard to State health insurance, its introduction will not contradict the constitutional instruction that «State and communal health care institutions provide medical care free of charge» only if the payers of mandatory insurance payments (contributions) are organizations, institutions, businesses and other economic parties engaged in business activities, State funds, etc. The deduction of such payments (contributions) from individuals in the system of State health insurance will not comply with the constitutional provision under interpretation since it will be one of the forms of payment for medical care provided in State and communal health care institutions.

We would stress that the Constitutional Court's Judgment makes it impossible to introduce mandatory State health insurance where the compulsory payments are imposed upon individuals. This point is often ignored by Deputies who table draft laws on the given subject.

Yet despite the Constitutional Court's Judgment, the Cabinet of Ministers is planning (the Verkhovna Rada has not yet considered all the necessary draft laws) to collect a single social contribution which will include medical social insurance, with these contributions being made by both employers and those with social security (see Table 2).

Table 2. Contributions 5 years after the introduction of a new system of social insurance

	Against accidents	Against unemployment	Pension	Medical	Total	Current legislation
Employer	1,4%	0,9%	22,1%	4,2%	28,6%	37,5%
Individual covered	–	0,9%	9%	2,5%	12,4%	3,5%

5. HEALTH INSURANCE

The concept of social insurance was approved in 1998 with the adoption of the Law «The Fundamental principles of legislation on mandatory State social insurance». At the present time there are four funds serving four types of insurance: a pension fund; an Industrial accident and occupational diseases which have caused disability Fund; an Unemployment insurance Fund; and a Social Insurance Fund for Temporary disability and expenses related to maternity leave and funerals. Article 4 of this Law mentions health insurance as another mandatory form of State social insurance. However no draft law on introducing mandatory State health insurance has been passed by the Verkhovna Rada. (two draft laws similar in essence, No. 4505 and 4505-1 were considered by the Verkhovna Rada in the pre-2006 elections term).

In 2006 the most public attention was aroused by a draft law «On funding health care and health insurance» (No. 2192 from 19.09.2006).

The draft law proposes establishing procedure for attracting extra funding for the health care system while also introducing delineation into two organizational and financial programmes:

– State social medical provisions funded from a consolidated budget which must ensure *a minimum guaranteed level of medical care in State and communal health care institutions for all citizens* and *in full for certain categories*;

– Mandatory health insurance through compulsory contributions which should be paid in equal proportions by employers and bodies of local self-government in the case of those employed, and by the bodies of local self-government and social security funds in the case of people who pay various forms of single taxes, or the self-employed, as well as those who receive social security support; by working individuals for those in their care (not including children)

Responsibility for implementing the programme is to be vested with a State health insurance organization, then later with a Health Insurance Centre to be created by all parties to health insurance.

The draft law envisages stipulating basic principles for the development of voluntary health insurance and the provision of medical services at a fee as an additional source of financing for health care, as well as certain organizational changes to the system of health care.

According to the draft law, patients would be restricted in their rights to medical care of a particular quality, the scope of which would be foreseen by the State programme for medical provisions, the Programme for mandatory health insurance, the programmes for voluntary health insurance or by contract.

In addition, the State programme for medical provisions would stipulate which categories (such as orphans, young men doing military service, convicted prisoners, and others) were eligible for more than the normal life-maintaining level of health care in State and communal health care institutions and this would be financed fully from the State programme.

Other than these categories, only insured individuals would be entitled to more than the life-maintaining level.

One would note that these norms infringe the requirements of Article 49 of the Constitution regarding the duty of the State as being to create conditions for *effective medical care available to all.*

The Constitutional Court's Judgment of 29 May 2002 clearly states that health care free of charge should be provided to all citizens in full measure, this including medical care not only directing at maintaining life.

The draft law breaches the *principle of free choice of doctor and health care institution* (Article 6 of the Fundamental Principles), as well as the *principle of equal rights and universal availability of medical care* (Article 4 of the Fundamental Principles). It clashes with Articles 142 and 143 of the Constitution and Articles 61 and 67 of the Law «On local self-government in Ukraine» which stipulate that territorial communities themselves determine how budgetary funds are to be spent, while spending of bodies of local self-government arising as a result of decisions of the public authorities and previously not provided for by the relevant financial resources are compensated by the government (health care establishments are mainly financed out of local budgets).

Nor to a large extent is the draft law coordinated with programme documents in force at the present time. This concerns, for example, the Presidential Decree «On a Development Strategy for public health care in Ukraine» on the directions and stages for reform of the health care system, as well as the «Programme of actions of the Government on developing health care and medicine in Ukraine».

The introduction of general mandatory State social health insurance is foreseen by the ««Fundamental principles of legislation on mandatory State social insurance»

Another draft law «On general mandatory State social health insurance was also under review in the Verkhovna Rada. The draft law had been passed in its second reading on 17 January 2001 however it was not supported by the Verkhovna Rada in its third reading.

The conceptual project under consideration provides a kind of alternative to the above-mentioned documents. There are very cogent grounds for the emergence of such an alternative since experience of moving from a purely State budget to an insurance-based system of financing of medical care (in the first instance this concerns the Russian Federation), demonstrates that such a transfer is accompanied by numerous adverse consequences, first and foremost, a rise in overall expenses (this is indicated in resolutions rejecting draft laws on general mandatory State social health insurance). There are also infringements of the system for financing medical establishments, combined with a lack of any real improvement in the quality of medical services and at the same time the retention of the «informal» forms of payment for provision of such services (this practice also exists in the case of patients who have treatment on the basis of voluntary health insurance in Ukraine).

The main reason for this, in our view, is the lack of an effective intermediary on the market for medical services that could ensure proper organization and protection of the rights of the person insured. With regard to this, it should be noted that in the course of the evolution of systems of social health insurance in EU countries, where this type of insurance is reasonable successful at ensuring a problem level of social guarantees, the role of such an intermediary is undertaken by a mutual insurance society – hospital funds created in the main directly at enterprises.

Instead, the draft envisages making insurance organizations acting on civil-legal principles in accordance with the Law «On insurance» responsible for protecting the rights of insured individuals. The draft law makes an attempt, when creating a system of mandatory health insurance, of combining the positive elements of social and civil-legal insurance which, incidentally, has no direct precedents in world practice. In many cases, at the present time, insurance organizations and hospital funds play the role of intermediary in legalizing fee-charging medical services in State and communal health care establishments. One is therefore doubtful about the possibility of their reorientation to become patients' representatives.

6. MEDICAL LIABILITY AND DOCTORS' RIGHTS

The Criminal Code in force from 2001 and the Civil Code of 2003 have established a wide range of actions for which medical personnel bear criminal or civil law liability.

At present doctors may be prosecuted under the following Articles of the Criminal Code: 130 «Infecting a person with HIV or another incurable infectious disease»; 131 «Inadequate fulfilment of professional duties leading to a person becoming infected with HIV or another incurable infectious disease»; 132 «Divulging information about a medical test for HIV or another incurable infectious disease»; Article 134 «Unlawfully carrying out an abortion»; 138 «Unlawful medical treatment»; 139 «The failure by a medical worker to provide medical care to a patient»; 140 «Inadequate fulfilment of professional duties by a medical or pharmacy employee»; 141 «Violation of patients' rights»; 142 «Unlawful experimentation on a human being»; 143 «Breach of legally established procedure for human organ or tissue transplants»; 144 «Forcing somebody to become a donor»; and 145 «Unlawful disclosure of a medical secret».

Officials of hospitals (the director, chief doctor or head of department) are also quite often accused of misuse of their official position (Article 364 of the Criminal Code); work fraud (Article 366); professional negligence (Article 367) or taking a bribe (Article 368).

According to figures from the Ministry of Internal Affairs, in 2006 7 crimes were registered with criminal investigations launched under Article 139. One person was convicted in 2006 under Article 139 and under 140 – 7 people. Under Articles 141-145 of the Criminal Code during the year there was not one conviction.[23]. However, according to information held by the Kharkiv Human Rights Protection Group, three court cases are continuing under Article 143. In two cases first instance courts have passed verdicts over charges of breaching legally established procedure for human organ or tissue transplants. Appeals against these verdicts are still being heard.

The Civil Code has also not ignored doctors, imposing civil-law liability for some acts: compensation for damages, crippling a person or in causing other damage to a person's health» (Article 1195). There are quite often civil compensation claims for moral damages against doctors (Articles 1167, 1168).

On the basis of the very wide list of Articles imposing liability as well as the extremely high price of a doctor's mistake which are in no way in keeping with doctors' working conditions, an «All-Ukrainian Project to Protect Doctors' Rights emerged[24],. This takes a different perspective, looking at doctor – patient from the point of view of the doctor. The experts on this project have identified a new type of patient – «patient racketeer» who files suits with the court without any ground demanding incredible amounts in compensation for damages. The project also mentions that «insurance companies, societies for consumer (patient) rights and other organizations with a huge army of hungry lawyers have appeared on the medical market. As a result, doctors once again became convinced of the need for legal defence. Yet the question arose, who was in a position to achieve this. A general practice lawyer is not au fait with the specifics of the medical profession. Only a lawyer with medical training could achieve this (A.P. Zilber, 1999, 2000)». The problem is thus the readiness of general courts to examine one of the complicated categories of so-called «medical» cases demanding special medical knowledge and an analysis of a huge amount of official documentation. The need accordingly arises for specially trained lawyers able to provide qualified representation of the parties' interests in such cases both with the public authorities and in the courts.

7. THE ARMY AND PATIENTS' RIGHTS

Major problems pertaining to patients' rights arise because Ukraine has a conscript army. For young men there is a constitutional obligation (Article 17) to serve for one year in the Armed Forces unless they have legitimate social, ideological or educational reasons for having the duty waived. The violations of the rights of pre-conscripts, conscripts and soldiers as patients are directly linked with the general level of medical services for the public. The Armed Forces are hostage to an unreformed medical system with this having an effect on the level of supervision over children and teenagers, the level of medical care to teenagers with chronic medical conditions, and especially the level of medical examinations of teenagers and young men by medical commissions of the District or Regional military registration and enlistment offices, as well as medical establishments where expert examinations are carried out at the instruction of a military registration and enlistment office.

A contract army will also have problems with unhealthy soldiers if health care does not undergo a radical overhaul. There is however a crucial difference. When taking on people for contract service, military doctors will be inclined to not take those in ill health who will then need to be paid compensation under the contract. Nevertheless, figures showing the number of military servicemen transferred to the reserve due to their state of health are staggering. During 2006 military medical commissions of military medical establishments of the Ministry of Defence declared as unfit (or of restricted fitness) for military service 7,375 military servicemen, of whom officers, ensigns and servicemen on contract accounted for 5,950, while there were 1,425 soldiers on military service.[25]

Unfortunately nobody is inclined to carefully examine conscripts and pre-conscripts (those being prepared for call up) even though it is dangerous and costly to have conscripts in ill-health in the

[23] Letter from the State Judicial Administration № 14-3485/07 from 06.06.2007
[24] *http://www.nir.com.ua*
[25] Letter from the Ministry of Defence № 321/4/3527 from 07.06.2007

army, for the young men themselves, for the army and for society as a whole. It is these conscripts who most often become victims or find themselves in situations involving hazing. They are very often also the carriers of infectious diseases – HIV, hepatitis, etc.

A person may be released from military service due to his state of health. The rules of procedure both for military service and being released from it are regulated by Orders № 2 and № 207 of the Ministry of Defence which contain a list of illnesses and procedure for examination of conscripts and pre-conscripts, as well as «Regulations on the preparation for and holding of call-up for military service».

All young boys who have reached the age of 16 are considered to be pre-conscripts and by law they are examined in the year when they are to turn 17. All young lads go through this regardless of their state of health, social position, educational situation or convictions.

The Kharkiv Human Rights Protection Group has been involved in defending the rights of pre-conscripts, conscripts and soldiers for over 14 years. As a rule it is the parents who approach us, or the conscripts themselves who complain of an inadequate examination by the medical commissions of the District or Regional military registration and enlistment offices, or by a medical establishment on the request of the offices. Some complain that their chronic medical conditions have not been taken into account.

In checking such complaints we usually encounter a number of standard infringements by medical staff, as well as inadequate responses by the parents of the conscripts or pre-conscripts, unawareness of their rights and duties. This makes it possible for the district or regional military office medical commissions examining the young lads to disregard current legislation.

Very often, for example, parents don't keep medical documentation about their children's chronic conditions or do not have them registered with the relevant specialists when changing to another clinic. They don't appreciate their responsibility for the health of their children and don't take them to specialists either through lack of money or because they don't trust doctors.

This means that pre-conscripts' medical records often do not contain documentary proof of diagnoses, injuries, medical operations, etc. The lack of such documents, even where the complaints are mentioned, usually means that the young lad is declared able to serve. Parents of pre-conscripts do not often seek help at this stage even though the law with regard to their child has already been violated. This means that at call-up stage, the medical commissions are dealing with incorrect and incomplete information about the conscript which makes it difficult to reach a proper decision about their eligibility.

For example, Ms M from the Kharkiv region approached KHPG. She asserted that her twin sons had been in ill health since childhood but that the medical commission was not agreeing to examine them properly. They were first examined by the KHPG medical expert who found grounds for sending them to a neuro-pathologist. The results of the latter examination were accepted as reason for waiving military service for both brothers on medical grounds.

If parents of a pre-conscript draw attention to an inadequate conclusion of a medical commission, they can seek to have it revoked by getting another examination, either arranging this independently, or via the military office medical commission, with this examination according to the law being carried out free of charge. Parents often have difficulties communicating with the call-up medical commission and sometimes they are simply not allowed in. This is in breach of Article 154 of the Family Code according to which parents are considered the legal representatives of their children and have the right to represent them in all public authorities.

Refusal to have an additional examination and the lack of money to pay for such an examination are, as a rule, what prompts people to turn to KHPG at this stage. Most often the young lads have not been diagnosed properly and we seek a proper examination.

Since 2000, KHPG, together with the section of legal assistance of the Kharkiv Regional Union of Soldiers' Mothers and a working group of the International Society for Human Rights – Ukrainian Section, have been monitoring the quality of the call-up. Questions are directed to military units about the state of health of conscripts from Kharkiv and the region, about any asocial or suicidal tendencies, attempts to run away, etc. The answers received give grounds for drawing conclusions regarding the general quality of the selection process, which we would rate as generally low.

A medical system ridden with corruption cannot adequately assess the state of health of young people, and the lack of accountability makes it even more dangerous. We encounter cases where young men with psychological disorders or people suffering from hepatitis C or B, or who are HIV-positive end up in the army. Unlike other countries that still have a conscript army, there is no law in Ukraine allowing for a suit to be brought against a medical commission or establishment which gave an incorrect diagnosis. Moreover, conscripts often have money demanded of them during the examination. We encounter direct demands for bribes for confirmation of illnesses which are in fact real. In the case of conscript S, for example, who suffered from stomach and duodenum, a doctor demanded a bribe of 680 UAH to write the diagnosis «ulcer». In another case, for an X-ray description of the skull after a brain injury, a neuro-pathologist demanded a bribe of 200 USD. In both cases, we had to turn to the regional department of health and the management of the medical institutions.

Orders № 2 and № 207 of the Ministry of Defence, giving a list of illnesses, procedure and forms for medical examinations have a number of serious shortcomings. They do not take into consideration the present state of health of young people and the social specific features of conscription. The list of illnesses focuses on irregularities of body organs, present at the time of the examination. They seldom bear in mind the fact that a young man found fit for military service will find himself in conditions of heightened psychological and physical pressure, and often stress. The list of illnesses and accompanying explanations should therefore allow for the consequences of such pressure. This applies particularly to illnesses involving bones, muscles and connective tissue (Articles 69-74); disorders of the endocrinal system (Articles 11-12); digestive disorders (Articles 51-58); disorders of the nervous system (Articles 21-24); and especially psychological disorders (Articles 4-20) which are generally incompatible with military service. It is under these Articles that most infringements occur during call up and our monitoring shows that these are of a systemic nature.

Perhaps the major factor with mistakes when determining fitness for military service is the lack of knowledge of medical staff of even the inadequate legislation available in the form of Orders № 2 and № 207. As a rule the doctors of general State or communal health care institutions for the city and region examine the conscripts as for any patients, not giving any consideration to the specific circumstances that the young men will be in. For example S., who was found on a scan to have a diffuse thyroid disorder, was not sent by an endocrinologist for thyroid tests, as required by Article 12 of the Order. During a conversation it became clear that the doctor was generally unaware of the legislation for military service. This unfortunately is the rule, rather than the exception.

These problems with calling up young men in ill health probably have a socio-economic basis. After all the budget allocates only 7 kopecks (!) [the cheapest bus fare in Kharkiv is 25 kopecks – *translator*) on a first medical examination, and each additional examination decreases the overall amount spent on examining the needed intake. It is because of lack of financing that despite domestic and international reports suggesting epidemic levels of AIDS/HIV-infection, and hepatitis C and B, the Regulations on the call up do not contain special articles stipulating a mandatory test on at least those otherwise found to be fit for military service. In autumn 2006, during a voluntary blood test already in the military unit, one new conscript was found to be a carrier of the hepatitis C virus.

After each call up period in spring and autumn we learn of soldiers moved to the reserve due to hepatitis C, and sometimes AIDS. The number of such cases is likely in fact to be considerably higher since such infection is generally only discovered during voluntary blood tests among forces of the Ministry for Emergencies, defence units, or among soldiers who end up in a hospital with a clinic for hepatitis. Personnel of military hospitals believe the numbers of those infected to be higher. The government therefore needs to increase spending on examining conscripts, especially for dangerous infectious illnesses and to make the necessary amendments to Orders № 2 and № 207

One major problem is that young lads in ill health who are called up for military service often come from low-income families. They frequently want to do their service in order to improve their social status and have the opportunity to serve after the army in the police force, in security agencies, etc. They therefore say nothing about their health and may even conceal documents about their illness. In such cases the first examination is very important, and we often find a very superficial examination of young lads from socially vulnerable families who do not have documents about

their illness. To avoid such situations we would suggest shared liability of doctors for incomplete or inaccurate information, together with the young lads and their parents for deliberate concealment of information, and teachers who give inadequate references. Personal liability should also be introduced for doctors and health care institutions for an incorrect diagnosis, especially if the army incurred expense on treating an ill lad, or where the call up had serious consequences because of his illness.

Lacking the money for proper examinations, military office medical commissions often endlessly examine obviously unfit candidates, sending them away for 3 or 4 call up terms, and not taking a final decision. Nobody counts the cost of this. M had received deferments 4 times, and it was only our medical experts examined him, that he was sent for an additional examination, and found to be unfit for military service.

There are also a lot of problems with military medicine. KHPG constantly receives complaints of unqualified, inadequate or sloppy work by military doctors, especially in districts far removed from the regional centres, as well as of inadequate medical care for those with army disability status.

There are several reasons for this. There are, first of all, stereotypes from Soviet times, where soldiers with medical problems were from the outset treated as though they were pretending. Secondly, there is a generally low level of humanitarian training of military doctors, psychologists, etc. A third reason can be not approaching higher level medical establishments (regional or garrison hospital) in timely fashion due to an inadequate or negligent attitude to young men's health by the commanders of the relevant military units.

In 2006 and early 2007 there were several flagrant examples of violations of patients' rights in the army. One of the most tragic involved S. from Kharkiv who was doing his service in the Odessa region. In March 2005 he first complained of pain in his foot. Despite repeated complaints, even after the foot began swelling, no action was taken. Doctors only paid any attention when the swelling got so bad that he couldn't put his boot on. Yet even then a diagnosis was not made. The commander of the unit deliberately concealed information from the young man's mother. It was only after three months that S, already in a very bad state, was sent to the Odessa district military hospital where he was diagnosed as having Ewing's sarcoma on the left heel. He was operated on and treated at the Central Military Hospital of the Armed Forces. Despite the treatment, the cancer had had time to spread and S died in 2006.

8. RECOMMENDATIONS

1. Pass a Law «On amendments and additions to the Law «On the fundamental principles of health care legislation in Ukraine», to ensure that the Fundamental Principles comply with modern requirements of international and domestic law. The amendments should be aimed at the following:

- ♦ providing a clear legal definition of «medical care», «medical services», «medical practice» and «auxiliary services in health care»;
- ♦ regulating approaches to determining the list of medical services and medicines and other products with a medical purpose, the cost of which is either not covered or is only partially covered by the State Budget; defining how patients can share a role in paying for such medical services, medicines and other products with a medical purpose;
- ♦ improving regulation of the procedure for ensuring the right to freely choose ones doctor or health care establishment;
- ♦ defining clear procedure for free choice and change of primary care doctors;
- ♦ primary care doctors keeping registers of the patients under their care;
- ♦ introduction of patients' access to inpatient and specialized outpatient care solely on referral by a primary care doctor, provided on the basis of the relevant medical indicators; prepare a clear list of conditions under which patients have the right to make a direct appeal for free inpatient and specialized outpatient care without such a referral;
- ♦ establishing clear medical and legal criteria for hospitalization, refusing to hospitalize somebody; treatment and discharge from hospital.

2. Adopt a new version of the Law «On the use in Ukraine of narcotic substances and psychotropic means, their analogues and precursors, and abuse of these» (2000) which allows for health care institutions regardless of their form of ownership to hold, transport, procure, sell, produce, use or destroy narcotic (psychotropic) medicines and precursors included in No. 2 table IV of the List of narcotic substances, psychotropic means, and precursors

3. Urgently improve Ukraine's legislation regarding the development of legal mechanisms for financing the system of health care.

4. Submit draft laws on amendments to the Budget Code of Ukraine, and the Laws «On local self-government in Ukraine» and «On local State administrations» aimed at ensuring the effective combining of financial resources for the health care system with the medical risks at regional level.

5. Introduce a course on Medical Law in higher medical educational institutes'

6. Prepare textbooks and other study material for teaching a course on Medical Law

7. Create a network of independent centres of «Law-based medicine» on the basis of civic organizations.

8. Introduce amendments to the Constitution of Ukraine or initiate a new review concerning the interpretation of «free of charge» by the Constitutional Court.

9. Define at legislative level a base model for organizing medical funding: i) funding from the State and local budgets; ii) mandatory social health insurance; and iii) medical insurance on a civil agreement basis;

10. In order to have the draft law «On financing health care and health insurance» (№ 2192) brought in as well as in order to carry out further reforms of the health care system, the following are needed:

♦ the introduction of contract relations between the party paying (i.e. the patient) and the party providing the medical services (a physical or legal entity);

♦ definition of the status of the health care institution as the provider of medical services with the relevant rights and powers, for example, reorganizing communal health care institutions into non-commercial communal enterprises;

♦ acceleration of the implementation in practice of national standards and protocols for providing medical care;

♦ procedure for the creation of State and communal commissioning for providing the Ukrainian public with medical services;

♦ definition of the patients' rights and duties;

♦ informing patients as consumers of medical services about the procedure for receiving these services and ensuring transparent access to medical information;

♦ ensuring the possibility of alternative mandatory health insurance at the individual's choice – both in the form of social and civil insurance.

In order to improve the quality of call up to military service:

1. Urgently review Orders № 2 and 207 of the Ministry of Defence, taking into consideration the state of health of young men of call up age, conditions of military service and socio-economic problems;

2. Introduce doctors' personal liability for allowing the call up of somebody who is ill;

3. Introduce administrative liability for deliberately concealing information about the health, psychological state and level of social adaptation for conscripts, their parents, teachers and doctors of all health care institutions responsible for providing medical documentation to medical commissions of district and regional military registration and enrolment offices.

4. Ensure compliance with the Judgment of the Constitutional Court of Ukraine from 30 October 1997 in the case of K. Ustimenko, with regard to issuing medical documentation of conscripts to their parents or legal representatives;

5. Increase budgetary spending on medical examinations for conscripts, especially on latent infections, such as hepatitis C, B, AIDS and tuberculosis.

6. Ensure that all doctors who have any dealings with expert assessments regarding fitness for military service are familiar with the requirements of Orders № 2 and 207.

XVIII. ENVIRONMENTAL RIGHTS[1]

1. ENVIRONMENTAL RIGHTS IN THE EVOLVING UNDERSTANDING OF HUMAN RIGHTS

1.1. THE CONCEPT OF ENVIRONMENTAL RIGHTS

The concept of environmental rights formed during the second half of the twentieth century, prompted by the escalating environmental crisis in countries of Europe and America, rising competition between countries for natural resources, the activity of the Green movement and finally the Chernobyl Disaster.

Some principles of environmental rights were defined in strategic studies and documents of «soft international law», such as the report *The Limits to Growth* prepared by D.L. Meadows et al. for the Rome Club (1972); the Stockholm Declaration of the United Conference on the Human Environment (1972); the World Charter for Nature (1982); The Report made by the World Commission on Environment and Development in 1987.» *Our Common Future*» (the Bruntland Report); the Rio Declaration from the United Nations Conference on Environment and Development (the Earth Summit) in 1992; the European Charter on Environment and Health (1989); the UN General Assembly Declaration of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals; the United Nations Millennium Declaration (2000); and the Johannesburg Declaration on Sustainable Development (2002).

For example, the Bruntland Report «Our common future» emphasises the need to move to sustainable development defined as «*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*». The authors of the report conclude that the survival and well-being of humankind will depend on how successful they are at raising the principles of balanced development to the level of global ethics, with human beings at the centre as part of a single natural whole.

The first principle of the Rio Declaration proclaims: «Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.» Principle 3 states: «The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.» In the tenth principle, we find: «Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.»

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[1] Prepared on the basis of a monitoring report «Observance of environmental rights: Ukraine, 2006», to which the following contributed: Hennady Marushevsky and Yaroslav Movchan (National Ecological Centre of Ukraine); Serhiy Fedorynchyk (Information Centre of the Ukrainian Environmental Association «Zeleny Svit» [«Green World»]; Serhiy Shaparenko («Pechenihi»); Hanna Holubovska-Onisimova (All-Ukrainian Environmental Civic Organization «MAMA-86»); Olha Melen («Environment – People – Law»); Andriy Olenyuk («Helsinki Initiative – XXI) ; Yury Babinin (Union «Civic Watch»); Oleksandr Stepanenko (the environmental and humanitarian organization «Zeleny svit») and others. General Editor: Oleksandr Stepanenko

The United Nations Millennium Declaration passed by the UN General Assembly in September 2000 affirmed the states' responsibility for global partnership in reducing poverty, improving healthcare, ensuring peace, defending human rights and safeguarding the stability of the environment. As fundamental values for the twenty first century the Declaration named respect for nature and the resolve « to adopt in all our environmental actions a new ethic of conservation and stewardship» This should encourage humanity to change present unsustainable models of production and consumption, in particular, «to stop the unsustainable exploitation of water resources by developing water management strategies at the regional, national and local levels, which promote both equitable access and adequate supplies»

There remains at present no universally recognized definition and list of environmental rights. They are defined only as the sum of non-property human rights, enshrined in international and domestic legislation which define relations with the environment and provide for physical existence.

In 1996 Professor Steven Rockefeller formulated 47 fundamental principles from international legal acts, reports and strategies passed over the last 25 years pertaining to the protection of the environment and sustainable development. Among these principles with respect to environmental rights we find the following:

- the right of each person, including future generations, to a clean and healthy environment;
- interdependence of universal human rights and the right to peace, development and a clean environment;
- the right to receive and circulate environmental information;
- public participation in decision-making on environmental matters;
- the right of each person to real access to legal and administrative procedures;
- the responsibility of the government to compensate victims of environmental disasters and to restore the damaged ecosystems;
- general responsibility of humanity for the state of the environment;
- the principle of equal responsibility of states for the degradation of global ecosystems;
- protection, preservation and renewal of natural ecosystems;
- the need for development of international environmental law;
- the principle of uniting the development of society with the preservation of the environment.

As we see, environmental rights define various aspects pertaining to protection of the environment since without the latter humanity's very existence is precluded. Environmental rights include: the right to a safe environment; protection of health and life from the unfavourable influence of environmental factors; compensation for damage to health or property due to breaches of environmental safety; the right to use natural resources, to information about the state of the environment and others. Environmental rights are an integral category, linked with the natural human right to life and personal security.

The concept of environmental rights has yet to become a classic self-contained system. Such rights are traditionally placed in the group of socio-cultural and economic rights together with the right to education, healthcare and employment which is not quite correct. Environmental rights cannot be squeezed into any established categories of human rights. They have their own specific features, and pertain to both negative and positive rights, civil and collective human rights. One specific aspect of these rights is that the foundation for their implementation in the interests of the individual and society is the preservation of another part of the existing system – the natural environment with its countless factors, parts and organisms. It is for this reason that the issue of providing an objective assessment of the state of the environment is vital for exercising environmental rights.

Environmental law in general, as a system of legal norms and principles, regulating public relations on environmental issues, is in a state of dynamic development. It embodies the most varied and sometimes contradictory features of public and private law. There are thus grounds for separating environmental rights into an independent section which occupies a particular place in the structure of human rights.

1.2. THE CONCEPT OF THE RIGHTS OF FUTURE GENERATIONS

Global environmental problems require that we think about the consequences of human activities. The possibility that humanity could destroy all life on Earth led to the concept of the rights of future generations.

In the preamble to the 1996 Ukrainian Constitution there was for the first time mention of the responsibility of the Verkhovna Rada and of the entire Ukrainian people to future generations («aware of our responsibility before God, our own conscience, past, present and future generations»). One of the rights of future generations can in a certain sense be understood to be the preservation of the gene pool of the Ukrainian people, and this duty is imposed upon the government in Article 16 of the Constitution.

The Preamble to the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters affirms that: «every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations».

An affirmation of the environmental rights and interests of present and future generations, according to which the natural environment is protected, is also contained in the preamble to the base Ukrainian Law «On the protection of the natural environment».

It is difficult to speak of the rights of future generations since we know too little about this future. At the same time, the assertion cannot be questioned that our descendents must also have the fundamental right to life and safety, with it being intrinsically impossible to enjoy this right in a polluted and exhausted environment.

It would perhaps be better to speak of the rights of those people who are not here now, and about the duties before future generations of those people who are living on Earth today. One of such duties is to hand down to future generations the whole entirety of the planetary ecosystem which we have inherited. Our duty will be to not destroy future life whether through nuclear disaster, or climatic change, excessive waste, genetic catastrophe or some other effects that we do not even know anything about. We need now to get rid of manifest dangers and leave future generations natural resources which have not been exhausted and can meet their basic needs.

When the interests of people in the future are taken into account, the generally accepted limits of our moral duties are extended both in time and in space. In order to ensure the right of future generations to a clean and healthy environment, it is imperative that people learn now to live only on the interest from natural resources, not dipping in to their capital and that they ensure at least that it is simply reproduced.

1.3. RESTRICTIONS OF ENVIRONMENTAL RIGHTS: THE BALANCE OF RIGHTS AND RESPONSIBILITIES

Clearly there are virtually no rights which can be absolute since their unlimited use conflicts with the rights of other people or society as a whole. An important and complex aspect of human rights is determining their boundaries. In the Ukrainian Constitution the interests of protecting the environment, as a prerequisite for environmental safety, is the basis for a certain limitation of other human rights, for example, economic and property. The duty arises and is exercised in society on the basis of ethical norms and in parallel with the law, serving as means for safeguarding the rights of other people. Environmental rights are also very closely linked with responsibility and duties.

In looking over the Constitution and Ukrainian laws, one can identify a whole list of duties, including environmental placed on individuals. . Article 66 of the Constitution states that «Everyone is obliged not to harm nature, cultural heritage and to compensate for any damage he or she inflicted». The duties of citizens with regard to protecting the natural environment are stipulated in Article 12 of the Law «On the protection of the natural environment». Ukrainian citizens have the duty to guard and care for nature, make rational use of

its riches, observe the requirements of environmental safety, respect the environmental rights and legitimate interests of others, pay for special use of natural resources, as well as fines for environmental offences, and compensate damages caused through pollution or other negative impact on the environment.

The theory of human rights stresses people's equal rights and therefore implicitly speaks of equal responsibility. However there is a crucial difference between the ethics of rights and that of responsibility. The ethics of responsibility stresses that responsibility is not the same for all. Those who have more possibilities bear more responsibility. This can be applied to individuals, legal entities and to countries. In international legal acts the principle is established of different responsibility for economically developed and poor countries. Responsibility demands that a person be capable of taking into consideration public interests and natural restrictions and of finding optimum ways of acting.

1.4. PUBLIC ETHICS AND LEGAL AWARENESS

As one of the deep-lying reasons for the ineffectiveness of practical application of the humanistic legal principles proclaimed in the Constitution and laws of Ukraine, as well as in international legal acts, one can mention the fact that these principles have not become intrinsic elements in public ethics and legal awareness.

At present in Ukraine we are going through a time when society to a large extent has lost its moral and ethical bearings. At first the ethical values entrenched in the agricultural culture traditional for Ukraine was destroyed. Later there was a devaluing of the «ethics of builders of socialism». One is forced to acknowledge that thus far there has been no natural emergence of an integrated humanistic ethic, one of the elements of which would be respect for nature as the unequivocal foundation of the harmonious life of contemporary and future generations.

In present-day Ukraine all too few people are ready to defend their constitutional right to a safe and healthy environment. Even fewer are ready to consciously restrict their own activities so as not to infringe the environmental rights of others, and not to destroy the diversity, integrity and balance of the natural world.

Only when the principles of environmental ethics and law become a part of people's perception of the world and determine people's behaviour will they be firmly installed in working, and really mandatory, as opposed to declarative, legal norms. The development of a new, environmentally oriented, legal awareness, based on an intrinsic acceptance of the values of environmental lifes must not only replace people's attitude to the issue of application of the law, but also direct public activity towards the changes in the legal sphere that will respond to the real risks of the twenty first century. Furthermore the expansion of the sphere of ethical and moral relations beyond the limits of the individual and the social – towards an integrated and many-faceted world of nature should help to create a stable, safe and truly caring society, built on relations of respect, care and cooperation.

As we see, human rights are not some fixed ideological structure, but a sphere of humanitarian thinking which is constantly developing. Each new understanding of human rights is another step in legal understanding. The history of the dev elopement of ideas about human rights is mainly the history of new concepts about rights and of those new legal theories formed on their basis. The emergence of new views in the theory of human rights is dictated by that experience which humanity gains and those risks on the path of its own development which it comes to understand.

We would hope that the development of concepts of environmental human rights and their inculcation in legal systems at the national and international level will not only make the theory of human rights and international legislation more effective and viable in the conditions of the twenty first century, but will be another step on the path to a humane and judge world order, built on an understanding of a new unity of human beings with their neighbour, country, humanity and the Earth.

2. ENVIRONMENTAL RIGHTS IN UKRAINE IN 2006

2.1. PROCEDURAL RIGHTS OF INDIVIDUALS AND CIVIC ORGANIZATIONS

A particular feature in the exercising of environmental rights is the public's participation in this process. The fundamental principle that the public should participate in the making of decisions on the environment is a vital element of domestic and international environmental law and defines its general democratic focus.

Among international legal acts the Aarhus Convention holds a special place. It is generally acknowledged that its provisions represent the highest standards in the sphere of freedom of information, democracy and participation. The Convention, like no other international document at the highest level of environmental policy is based on the principles of human rights and the rights of civic society. It is also unique in having a procedural character and in the fact that it applies to any sphere which can have impact on the environment.

Unfortunately, from year to year we are forced to acknowledge that the process of implementing the Aarhus Convention in Ukraine is taking place in the traditions of bureaucratic departmental administration. A separate subdivision has been created in the Ministry for Environmental Protection. Under the State Departments of the Environment and Natural Resources in the regions so-called Aarhus Centres have been launched, and strictly departmental documents and procedures have been drawn up, etc. It soon became clear, however, that full application of the Convention was impossible merely through the efforts of the Ministry for Environmental Protection and was also prevented by the lack of basic normative legal mechanisms, firstly, with respect to the activities of the public authorities and bodies of local self-government.

The public had to wait three and a half years for even minimal amendments to domestic legislation as a result of Ukraine's ratification of the Aarhus Convention. They were nonetheless introduced through Law No. 254-IV of 28.11.2002 on amendments to four laws, namely: «On protection of the natural environment»; «On environmental impact assessments»; «On local self-government in Ukraine», and to the Code of Administrative Offences. According to some assessments, in fact, in order to fully comply with the requirements of the Aarhus Convention amendments would need to be made to dozens of laws and hundreds of pieces of subordinate legislation. Moreover, even after the amendments actually introduced to the four laws, the state of implementation of the Aarhus Convention's provisions remains unsatisfactory. Despite the changes made, some of the provisions of, for example, the Law «On protection of the natural environment» fail to comply with the Convention's standards. In the case of other normative legal acts which clearly needed to be brought into line with the Convention, for example, the Law «On information», no changes have been made.

The last new items of legislation adopted in implementation of the Aarhus Convention's provisions were the **Resolution of the Verkhovna Rada «On informing the public about issues which pertain to the environment»** № 2169-IV[2] from 4.11.2004 and the **Cabinet of Ministers Instruction № 51333/1/1-04 from 17.11.2004**. The Resolution recommends that the Cabinet of Ministers and regional administrations ensure:

- that information is provided on an annual basis about 100 sites which are the most environmentally polluted;
- that information is provided on a quarterly basis about the ten most polluted sites in the natural environment at nationwide level during that quarter;
- that by 1 January 2005 provisions are drawn up and approved on a network of a nationwide environmental automated information and analytical system ensuring access to environmental information and local environmental automated information and analytical systems;
- that from 1 January 2005 the network of a nationwide environmental automated information and analytical system ensuring access to environmental information should be functional.

[2] http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2169-15

In the course of monitoring observance of environmental rights we were unable to ascertain what stage the creation of this nationwide environmental automated information and analytical system ensuring access to environmental information and local environmental automated information and analytical systems was in fact at and what this network would actually entail. Government structures from various levels and region were united in avoiding these questions.

Two years have passed since the date set for the implementation of the Resolution and it can be stated with certainty that it has not in any way been carried out. In this case we again observe the practice of consciously reducing provision of environmental information to the exclusive jurisdiction of the Ministry for Environmental Protection and its regional departments. In this situation other authorities come out seeming to not have any part to play in ensuring access to environmental information. This is despite the fact that in the Ministry for Environmental Protection [MEP] **Order № 397 from 01.11.2005: «On approving the Regulations on quarterly provision of information via the mass media about the most polluted sites in the natural environment»**[3] what is envisaged is that the State Committee on Television and Radio Broadcasting, regional, as well as Kyiv and Sevastopol City State administrations, will help in making environmental information public. This wish is ignored everywhere by State administrations.

At the beginning of 2005 the Ministry for Environmental Protection posted on its website a draft National Report on implementation in Ukraine of the provisions of the Aarhus Convention. Demonstrations of formalism, the document's declarative nature, the deliberate efforts to complicate the national report and in places downright disinformation aroused criticism from many civic organizations: the National Ecological Centre of Ukraine [NECU], Ecopravo − Lviv», the Bureau for Environmental Investigations, and others.

For example, the NECU Council, having reviewed and discussed at its meeting on 24 January 2005 the NECU response to the National Report on implementation of the provisions of the Aarhus Convention bearing in mind its own experience, categorically rejected provisions of the MEP Report and considered it to be unsuitable for being publicized and presented to the Convention's Committee.

As of the beginning of 2007 the text of the National Report on implementation in Ukraine of the provisions of the Aarhus Convention was unavailable for review on the MEP official website. Instead, «progress in implementing the Aarhus Convention in Ukraine» was illustrated by such «comprehensive» communications as the following: *«Progress of the implementation of the Aarhus Convention in Ukraine. May 2002. The first steps to create a public information centre and library in the office of the Ministry of the Environment and Natural Resources have been taken. A homepage about the Aarhus Convention has been established.»*

Undoubtedly the unsatisfactory level at which Ukraine is adhering to the norms of the Aarhus Convention is well understood by officials of the Ministry for Environmental Protection. However instead of making best efforts to create an atmosphere in which all without exception authorities in Ukraine take a responsible attitude to the commitments which Ukraine has taken on, MEP is trying first and foremost to avert sanctions from the United Nations Economic Commission for Europe (UNECE).

For example, on 5 June 2006 the Ministry for Environmental Protection sent a letter (№ 4940/04-7) to the UNECE Compliance Committee informing that the Ministry had finally, eight years after the signing of the Aarhus Convention «created a working group for developing a National Strategy for the implementation of the provisions of the Aarhus Convention in current Ukrainian environmental legislation. The Ministry therefore asks that strict measures, even including suspension of rights and privileges pursuant to the provisions of the Convention not be imposed during the twelfth meeting of the Compliance Committee in June 2006.»

As we see, the Ministry for Environmental Protection traditionally perceives international institutions in the first instance as punitive bodies. Lastly, no information about the results of the meeting of the Compliance Committee was posted on the MEP website or in generally available media outlets. Presumably they were less than cheering for Ukraine.

[3] http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=z1510%2D05

2.1.1. The right of access to environmental information

The most common means of receiving environmental information is via information requests from citizens to the relevant authorities. Monitoring of such requests from individuals and civic organizations during 2006 showed that the authorities are not complying with legislation. The authorities whom these information requests are addressed to often try to justify their refusal to provide information by claiming it is confidential, referring to intellectual property rights, State or commercial secrecy or the lack of special units within their structure responsible for providing members of the public with information. One very often encounters cases when the information requested is provided but not in full, without copies of official documents which it contains, this being an infringement of the requirements for complying with information requests.

Example 1: *During monitoring carried out by the National Ecological Centre of Ukraine [NECU] over 2006 more than 170 information requests were sent to the authorities. 21 letters received no response at all, or a formal response not containing information pertaining to the questions asked. Among government officials in 2006 who did not react in proper fashion to information requests and letters were President Yushchenko, Prime Ministers Yury Yekhanurov and Viktor Yanukovych, the Minister of Fuel and Energy Y. Boiko, the Minister of Justice S. Holovaty, Ministers for Environmental Protection P. Ihnatenko and V. Dzharti, the Head of the Board of Ukrhidroenergo S. Potashnyk, and other high-ranking officials.*

Example 2: *During 2006, «Zeleny Svit» [«Green World»] sent around 70 information requests and letters with questions pertaining to the environment. In 15 cases either no answers were forthcoming, or formal responses without information relating to the question were received, or the responses came with infringements of the time frames stipulated by Article 30 of the Law «On information».*

Example 3: *the organization «Environment – People – Law» (EPL) during 2006 sent around 150 requests for information in the main relating to the cases being run by EPL lawyers. Approximately 80% of the requests were met, this depending on the addressee and the nature of the information requested. There was no response to around 20% of the cases. EPL stresses that this success rate gives cause for concern about access to environmental information and that the problem must be resolved in the nearest future. Bearing in mind the fact that EPL is a reasonably influential organization capable of standing up for its right to information both with the Prosecutor and in the court, and that EPL information requests always contain references to legislation and reminders of liability for not providing information, this percentage of successful information requests leads the organization to believe that the success rate for individuals or civic organizations will be even worse. Members of the public and nongovernmental organizations often approach EPL asking to be able to send an information request in their name and on their forms out of pessimism as to their chances of receiving an answer themselves.*

Example 4: *Zeleny Svit volunteer A.A. Olenyuk sent an information request to the Lviv Sanitary and Epidemiological Service asking for figures for the level of pollution of the human environment caused by those regional enterprises on the list of 100 sites in Ukraine identified as the worst polluters. The letter also sought information about the effect of this pollution on public health. The Lviv Sanitary and Epidemiological Service refused to provide the information, asserting that «In order to satisfy the information requirements of members of the public, legal entities and the State Article 12 of the Law «On information» envisages the creation by public authorities and bodies of local and regional self-government information services, systems, networks and databases for carrying out information work. For sanitary-epidemiological services which are sanitary-prophylactic establishments of the State Sanitary and Epidemiological Service of the Ministry of Health, the creation of the above-mentioned subdivisions is not envisaged.»*

Interestingly, answers to analogous information requests sent by Zeleny Svit's regional partners within the framework of the project «Monitoring of environmental rights» in the Donetsk, Transcarpathian, Rivne, Kharkiv and Chernivtsi regions were received. The most comprehensive answer to the questions posed arrived from the Transcarpathian Regional SES.

Example 5: *The youth civic organization «Ecoclub» approached the State Department for the Environment and Natural Resources in the Rivne region requesting information about the environmental effect of two enterprises from the Ministry for Environmental Protection's list of 100 worst polluters: the closed joint stock companies «Rivneazot» [Rivne nitrogen] and «Volyn Cement». Despite the norms of*

the Verkhovna Rada Resolution «On informing the public about issues which pertain to the environment» and the Ministry's response to this in «On approving the Regulations on quarterly provision of information via the mass media about the most polluted sites in the natural environment», the Department in its response from 9 February 2007 effectively refused to provide the information which is supposed to be published quarterly. The Head of the Department A. Bobrovsky suggests: «In accordance with Item 3.2 of the «Provisions for rules of procedure on providing environmental information», approved by Order of the Minister for Environmental Protection on 18.12.2003, you are required to send your request for environmental information in a form according to Appendix No. 1 to the Provisions with no more than three questions on one environmental subject. Furthermore, in accordance with Article 36 of the Law «On information», the «requesters shall fully or partially compensate expenses incurred with meeting their requests for access to official documents and providing written information». In view of the above, we suggest that you come to the State Department (Rivne, 20 Tolstoy St), from 9-00 to 18.00 in order to agree all organizational and technical questions. In the event that we reach mutual ***understanding and agreement****, the Department does not object to providing you with the information on environmental subjects available in the Department.»*

Analyzing the responses to information requests, one can see that the least forthcoming with information are the offices of the Prosecutor, land resources, the Ministry of Health and local State administrations. Very often businesses, institutions and organizations of all forms of property, including State-owned or municipal, refuse to provide information.

The most common way of restricting access to environmental information continues to be classifying it as confidential. For example, the Head of the Mykolaiv Regional State Administration issued Instruction No. 221-I from 24.07.2006 «On approving the list of confidential information held by the State which is given the stamp restricting access «For official use only» in local authorities of the Mykolaiv region». A fairly wide range of types of information are deemed confidential, including the sources of water supply; the location of places with an accumulation of combustible objects, radioactive substances, potent poisons; guarding these and specific measures carried out to make their utilization safe; information about adverse effects caused by some event to a large number of people; destruction of storage containers for oil or gas products, transport and other communications.

Artificial obstructions to access to information can also be created by deliberately manipulating the concept of authors' rights. Since scientific studies are the basis for taking decisions as to whether this or that economic activity is acceptable, and the planning material for them is prepared by research institutes and assessed by experts, the information in such cases may also prove unavailable to members of the public. Restrictions in access to this information are then excused on the grounds of authors' rights. This applies to information requests addressed to authors of scientific result and to the government bodies which hold the information.

Example 6: *EPL approached the Ministry for Environmental Protection asking for a copy of the Opinion of the State Environmental Commission regarding the plans for the construction of the Danube – Black Sea Canal. The response contained the Opinion from the Ministry itself, but not the appendices which form an integral part of it. The omissions included the scientific environmental impact assessment of the project material which the specialists of one scientific institute had carried out on commission. The grounds given for not providing the Opinion was that it belonged to those who had ordered the assessment to be carried out.*

In accordance with the ««Regulations on quarterly provision of information via the mass media about the most polluted sites in the natural environment», the provision of environmental information regarding such pollutants of the environment is carried out by means of information to the media on a quarterly basis. Unfortunately, the authorities whom legislation obliges to ensure that the public are informed on environmental matters, relatively frequently avoid providing answers either via the media or in response to information requests. It is typical for regional administrations, offices of the sanitary-epidemiological services or bodies of local self-government to redirect such requests to State Departments for the Environment and Natural Resources.

Example 7: *On 12 January 2007 Zeleny Svit volunteer A.O. Stepanenko approached the Ivano-Frankivsk Regional State Administration requesting information about the impact on the state of the environment in the region of enterprises which, according to the Ministry for Environmental Protection*

are the worst polluters of the environment, specifically Bursztynska «Zakhidenergo», the State enterprise «Kaliyny zavod» [potassium factory), the open joint stock company «Oriana» and the municipal enterprise Ivano-Frankivsk Electricity.

A reply was received from the Central Economic Department of the Regional State Administration from 24.02.2007 № 05/10-141 signed by the Head of the Department V. Popovych, stating that the information was confidential and could not therefore be provided.

The response states that: «In accordance with Article 21 of the Law «On State statistics», original data received from respondents is confidential information which is protected by Law and used exclusively for statistical purposes in a summarized and depersonalized form. At the same time, pursuant to Article 22 of this Law, statistic information which makes it possible directly or indirectly to establish the specific respondent or determine the original data about the latter may be provided with the consent of this respondent and complying with the respondent's conditions, or if the information is received from generally accessible sources. You may therefore be provided with information about the scale of pollution in the Ivano-Frankivsk region».

Instead, the Regional Administration asks to be informed about the «legal grounds» for civic organizations carrying out monitoring into observance of environmental rights, preparing a report and publishing its conclusions.

On 9 March 2007 A.O. Stepanenko therefore sent a repeat information request to the Regional Administration, justifying its right to receive the information on the following grounds:

- *pursuant to Article 50 of the Constitution Everyone is guaranteed the right of free access to information about the environmental situation and also the right to disseminate such information. No one shall make such information secret, that is, classify it as on restricted access (secret or confidential);*
- *according to Article 30 of the Law «On information», information on the environment, or information whose concealment could present a danger to human life and health may not be classified as confidential;*
- *according to Article 25-1 of the Law «On the protection of the natural environment», offices of the Ministry for Environmental Protection at local level, bodies of local self-government, enterprises, institutions and organizations whose activities could have an adverse impact on the state of the environment, human life and health, must ensure free access of the public to information about the state of the environment. This same article imposes upon regional State administrations the duties of providing annual reports for the public about the state of the environment;*
- *in accordance with the ««Regulations on quarterly provision of information via the mass media about the most polluted sites in the natural environment», regional State departments shall facilitate wide coverage by State-owned audio-visual and printed media outlets of material on these site.*

It was pointed out that the previous information request had specifically pertained to sites in the region which are the worst pollutants. It had been dictated by the fact that in generally available official State-owned media outlets in the region there was no information about the impact of these sites on the environment.

It was only on 8 May 2007 that a response № C-15/822 from the Regional State Department was received with no indication of the date when it was sent which recommended approaching the State Department for the protection of the natural environment in order to receive the information.

One promising means of ensuring public access to information is the work of the websites of the public authorities and bodies of local self-government. The Presidential Decree «On additional measures to ensure openness in the activities of the authorities» states that all public authorities and bodies of local self-government must maintain websites and update them (with a delay of no more than five working days) with official information about the activities of the relevant bodies, implementation of programmes, plans, current and revoked normative legal acts, the forms and samples for documents, archival and other information. The Decree also points to the need to place on such websites draft normative legal acts and inform the mass media of this. At the present time, however, one could not describe as satisfactory the content, quality or up-to-date nature of the information place on the websites of most of these authorities. At least in the majority of cases, regional State Departments for the Environment and Natural Resources either do not have or do not properly maintain their own websites.

Example 8: *In response to a request for information from Zeleny Svit volunteer A.A. Olenyuk to the Lviv Regional State Department [RSA] asking to see the annual regional report «On the state of the natural environment in the Lviv region», RSA letter № 09-392 from 30.01.2007 advised him to use the official website of the State Department for the Protection of the Natural Environment in the Lviv region www.ecology.lviv.ua. However, it transpired that this website is not functional.*

In accordance with the provisions of Article 251 of the Law «On the protection of the natural environment», «provision of environmental information is carried out by public authorities and bodies of local self-government within the limits of their powers via the following means:

a) annual reporting by the Council of Ministers of the Autonomous Republic of the Crimea, regional State administrations, the Kyiv and Sevastopol City State Administrations of the relevant councils and the public about the state of the natural environment on the relevant territory;

b) systematic informing of the public via the mass media as to the state of the natural environment, the rate of change, the sources of pollution, the locating of waste products or other changes in the environment and the nature of the impact of environmental factors on human health»

Unfortunately, on the majority of official websites of regional State administrations and regional councils during 2006 virtually no information was posted regarding the state of the environment. There are also usually no special sections on particular topics.

Example 9: *In implementation of Item 9 of a separate Instruction from the Ministry for Environmental Protection № 93 from 13 June 2006, the Department for State Environmental Monitoring and Expert Assessments of Information Technology and the Protection of Information Resources shall periodically make information available to the public regarding the work of moderators and administrators of the Ministry's website. During the first half of 2006 the website had 1,522 visitors who viewed a total of 7,915 entries on the website, i.e. on average each visitor to the site looked at 6 entries. During that period, users of the site used the search facility 192 times, and in 64 cases received an answer. 128 such requests for information were not met. The ratio of information requests not met is rather high – 66.6%.*

Members of the team monitoring observance of environmental rights carried out their own analysis of the work of Ukraine's executive bodies.

They found that on the MEP website there was a list of normative legal acts pertaining to environmental protection which mentioned 775 normative legal acts of the central authorities. It turned out that this list had not been updated since 14 March 2005. The situation with preparing and publishing annual National Reports on implementation of the UN Framework Convention on Climate Change was even less satisfactory, with this not having been published since 1998. The website contained only a draft «National Report on the State of the Natural Environment in Ukraine for 2004». As of the end of February 2007 there was no sign of reports for 2005 or 2006. It should be noted that annual approval by the Verkhovna Rada and publication of a National Report on the State of the Natural Environment in Ukraine is a requirement of Article 251 of the Law «On protection of the natural environment».

Example 10: *In response to a request for information from Zeleny Svit dated 5.01.2007. № 06-01 regarding the lack of reporting, the Ministry for Environmental Protection, informed that: «the last report submitted for review by the Verkhovna Rada was the National Report on the State of the Natural Environment in Ukraine for 2003. This National Report was only published at the end of 2006. This is due to only partial financing for the work in 2004 and the possibility for its completion coming only at the end of 2006. Due to the lack of financing in 2004 the website of the Ministry contains a draft National Report for 2004. In view of this situation, the Ministry in its work plan for 2006 envisaged financing for scientific research work «Preparation and publication of a National Report on the State of the Natural Environment in Ukraine for 2004 and 2005». However, in accordance with Article 27 and paragraph 3 of part 1 of Article 28 of the Law «On procurement of goods and services with State funding» all tender bids for this work were rejected. As a result, the work has been planned for financing in 2007. In addition, in 2007 financing is planned for a National Report on the state of the natural environment in Ukraine for 2006».*

There is an analogous situation with preparation and publication of regional and special reports. On the relevant section of the MEP website: «Special and regional reports on the state of the natural environment», as of the end of February 2007 there was no sign of reports for the period from 2004

to 2006. The majority of reports from regional State departments for the environment and natural resources are only for 2004. Unfortunately, not all of these are particularly rich in information or convenient from a functional point of view. The last regional report on the state of the natural environment published on the Ministry's website is the report for Kyiv in 2004.

In 2006 the Ministry of Construction, Architecture, Housing and Municipal Economy (Minbud) published on their official website a «National Report on the Quality of Drinking Water and the State of Drinking Water Supplies in 2005». The State Committee for Nuclear Regulation's website posted a «National Report on Nuclear and Radiation Safety in Ukraine for 2005», while the Ministry for Emergencies and the Protection of the Population from the Consequences of the Chernobyl Disaster published its «National Report on Manmade and Nature Safety in Ukraine for 2005».

The Ministry of Health also attempts to provide information to the public on issues concerning health care and good sanitary conditions. Legislative regulation for this was introduced through Ministry of Health Order № 320 from 29 June 2005 «On ensuring openness in the work of the Ministry and informing members of the public about its work». At one stage the Ministry of Health declared its plans for placing draft laws and action plans on its website for public discussion. However as of the end of 2006 – being of 2007 the section «Public discussion» contained only a list of normative legal acts in the area of healthcare which had been prepared for approval by the central authorities over recent years. There is no information at all about the procedure for submissions from the public of proposals or how these are to be taken into consideration. Overall this Ministry's website is out of date and functionally inadequate. The section «Law creating work» has not been updated since 2003. The sections «Target programmes in the area of healthcare», «Danger factors», «Sanitary norms» and «Sanitary-hygienic expert assessments» are not active at all.

Example 11: *At the beginning of May 2007 the Ukrainian Independent Centre for Political Research published the results of their monitoring of how forthcoming with information the websites of 58 central authorities and 27 regional and city administrations are, and of implementation of the Cabinet of Ministers Resolution No. 3 from 4 January 2002 «On procedure for publishing information about the activities of the public authorities on the Internet».*

Results of monitoring Ukrainian ministries:

Out of 20 ministries, 19 have official websites. There is as yet no site for the Ministry of Housing and Communal Services. The average level of openness in providing information is 68%. The most informative sites are those of the Ministry of Transport and Communications (86.67%), the Ministry of Agrarian Policy (85%), and the Ministry of the Economy (81.67%). The least forthcoming with information were found to be the websites of the Ministry for Environmental Protection (48.33%), the Ministry of the Coal Industry (52.67%), and the Ministry of Defence (55.67%).

One important and promising form of providing the public with information about the environment is the publishing by investors and others commission environmental expert assessments of Environmental Impact Statements with regard to work planned. According to Article 35 of the Law «On environmental impact assessments», an Environmental Impact Statement must contain information about the planned activities, their purpose and ways of carrying them out; factors which have impact on the state of the environment, taking into consideration the possibility of emergency environmental situations arising; indicators for an assessment of the level of environmental hazards of the planned activities; measures guaranteeing the introduction of the activities in compliance with environmental standards, as well as informing the public about the planned work.

Unfortunately, the rules of procedure and terms for submitting an Environmental Impact Statement have yet to be properly regulated via normative acts. Only the Aarhus Convention which is a part of domestic legislation in this sense stipulates the duty of the public authorities to inform the public about the following:

a) the nature of the possible decisions, a draft decision;

b) the government body responsible for taking the decision;

c) the envisaged procedure, including how and when such information may be provided;

d) the beginning of the procedure;

e) opportunities for public participation;

f) the time and place of any planned public hearings;

g) any government body from which one can receive the relevant information, as well as who the relevant information will be submitted to for public consideration;

h) whether there is a relevant government body or any other official structure to which comments or questions may be sent, and about the timeframe for submitting comments and questions;

i) what environmental information is available.

Unfortunately, it has to be said that the process for publicizing Environmental Impact Statements in the majority of cases is more of a formality.

In this situation, the Cabinet of Ministers, Ministry for Environmental Protection and its regional departments are unjustifiably stalling on creating a single information source for providing environmental information. For many years now there has been talk of creating separate information bulletins and official web pages of the Ministry for Environmental Protection and its regional departments which would contain Environmental Impact Statements. It is worth recalling the failure to implement the above-mentioned Verkhovna Rada Resolution «On informing the public about issues which pertain to the environment» № 2169-IV[4] from 4.11.2004. The public authorities clearly have no interest in creating an official information and analytical system which could, among other things, ensure that Environmental Impact Statements were made public.

As a result, Environmental Impact Statements are often published in media outlets which are hardly accessible to the concerned public. Obviously the content of such Statements, as a rule, is not of interest to mass-circulation commercial media outlets, and they often get lost somewhere amid publications of an advertising nature. The time limits for making such Environmental Impact Statements public are in many cases breached. Sometimes the Statements are published a day or several days before the passing of the environmental impact assessment which makes any public participation impossible. The content of the Statement often fails to comply with legislative requirements, and the accuracy, comprehensiveness and objectivity of the information in it at times arouses doubts.

This is an infringement of the fundamental principles of studying environmental impact as defined in the Law «On environmental impact assessment» (Article 6): prevention, openness and consideration of public opinion. It manifestly fails to comply with the provisions of Article 8 of the Aarhus Convention, according to which the public should be efficiently provided with sufficient information with plenty of time to spare at the initially stages of decision-making on issues with impact upon the environment.

Information about planned construction work must be comprehensive, objective, understandable and accessible at the pre-planning stage. In the new State building norms «The makeup and content of environmental impact material in planning and building enterprises, buildings and structures» DBNA [State building norms] 2.2-1-2003, approved by Derzhbud Order No. 214 from 15.12.2003 and in force since 01.04.2004 the duty is stipulated of an investor or person commissioning the work of a Statement of Intent. However, in this case also, practice reflects a general problem lying in the lack of willingness to mobilize the appropriate resources, organizational and communication options for the sake of achieving European standards of transparency in the system of State governance.

During monitoring of the printed and electronic media in order to ascertain how much priority is given to environmental protection and the right to environmental safety, overviews have been periodically carried out of publications at nationwide, regional or local level which are popular among difficult groups in society. Several national publications were included («Dzerkalo tyzhnya» [«The Weekly Mirror»], «Holos Ukrainy» [«Voice of Ukraine»], «Silski visti» [«Rural news»], «Den» [«Day»], «Vlast deneg» [«Power of money»], «Svoboda» [«Freedom»] and others. Although Internet searches of printed publications point to a large number of publications mentioning «the environment» and «environmental rights», in fact this is explained by the excessive and unjustified use of such terms.

The monitoring in fact demonstrated a relatively low level of prioritization of environmental issues in both the printed and electronic mass media. Most such outlets do not regularly have information about the state of the environment or environmental rights. Only some of the national

[4] http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2169-15

publications (for example, «Dzerkalo tyzhnya») regularly maintain special sections with environmental information and have material of a reasonable high, professional, standard. In the printed and electronic media there is virtually no environmental or social advertising adapted for the wider public, aimed at developing a sparing attitude to resources and energy consumption; at rational treatment of domestic waste products; rational choice of items of consumption, as well as at instilling respect for nature and a healthy lifestyle. Instead, the columns or screens of media outlets teem with cigarette and alcohol advertisements, uncontrolled use of chemical domestic substances and materials, toxic methods for protecting plants, medicines, forming stereotypes of environmentally irresponsible behaviour, an unhealthy life style and consumerism.

Under such conditions people fail to develop an awareness of their own constitutional rights with regard to a safe natural environment, or a willingness to protect it.

2.1.2. Public participation in decision-making on environmental matters

The Law «On protection of the natural environment» affirms the rights of citizens in the environmental sphere, in particular: 1)) the right to take part in discussions and put forward proposals for draft normative legal acts, material on location, construction or reconstruction of sites which could have an adverse effect on the state of the environment; submitting proposals to the public authorities and bodies of local self-government, as well as legal entities taking part in the decision-making process; 2) taking part in drawing up and implementing measures for protecting the natural environment and ensuring rational use of natural resources; 3) participation in public hearings or open meetings on the environmental impact of planned activities at the stage of deployment, design, construction, reconstruction of sites, as well as public environmental impact assessments.

Article 11 of the Law «On environmental impact assessments» sets out forms of public participation in the process of governmental environmental impact assessments, with these including putting forward ones views in the mass media; submitting written comments, propositions or recommendations; including representatives of the public on expert groups and commissions. Individuals and civic environmental organizations can themselves initiate public environmental impact assessments. Their conclusions are passed onto the bodies which actually take the decisions and are of a recommendatory nature. Furthermore, it would be difficult to consider the right to submit proposals to the public authorities and bodies of local self-government, and legal entities taking part in the decision-making process on these issues to be an independent right since it is one of the forms of public participation in the discussion and inclusion of proposals to material on the locating of certain environmentally dangerous sites.

Example 1: *One of the initiatives for public participation in carrying out environmental impact assessments belongs to the Nikopol branch of the International Dnipro Fund and the Lower Dnipro Basin Council of the environmental movement «Khortytsa Forum». As the subject of their public environmental impact assessment, they chose a number of decisions by the Nikopol City Council and Executive Committee pertaining to environmental projection and rational use of natural resources, preservation of sites of natural heritage, the existing system of management of natural resources and mechanisms for taking decisions, implementing them and exerting control over them.*

For example, plans for 2006-2007 involve carrying out an analysis of the results and impact of the enforcement of decisions of the Nikopol City Council from 15 June 1990 No. 321 «On a city long-term programme for the protection of the environment and rational use of natural resources for the period up till 2005», the city environmental protection programme «The environment 2003-2012», adopted on 29 August 2003 and the «Strategic plan for the development of the city of Nikopol up till 2010». The aim of the public environmental impact assessment is to analyze how these decisions, results and the scope of the implementation, passed at local level, comply with current legislation in order to prepare proposals in carrying out an environmental audit, participate in the process of preparing and implementing this, and to draw up proposals for improvements to the city's environmental programmes bearing in mind proposals and demands from the public.

The Aarhus Convention envisages the right to participate in decision-taking on specific types of activities, plans and programmes linked with the environmental, and participation in preparing normative acts. In implementation of the Convention's provisions, the Ministry for Environmental

Protection prepared its own regulations which detail the procedure for participation and a list of decisions which the public shall be called in to take part in.

Unfortunately, as noted on many occasions, the procedure for public participation formulated in these Regulations is not in line with the provisions of the Aarhus Convention. Among forms of public discussion not envisaged is the important possibilities offered by public hearings. In the Cabinet of Ministers Resolution № 1378 from15.10.2004 «Some issues on ensuring public participation in the formation and implementation of government policy» which approved «Rules of Procedure for holding consultations with the public on the formation and implementation of government policy», public hearings are mentioned as one of the forms of public discussion. However in Resolution № 1378, there are no regulations for holding such hearings. This shortcoming takes on particular importance since it is precisely an imitation of public hearings that the authorities have recently made active use of in order to create the illusion of public approval for plans to build environmentally hazardous projects. As a result, «public hearings» on construction work at the Dniester and Kaniv Hydro-Accumulating Power Stations, or the plan «Construction of a deep water Danube – Black Sea Canal» were held without appropriately informing and involving the environmental protection community. Clearly the result of the reviews of each of these was the single option of approving the proposed plans which, in the opinion of many civic organizations in Ukraine, are not only environmentally hazardous, but also economically unwise. There is thus the problem of distinguishing the concepts of public hearings as a process which can include various forms of public participation and public hearings as a measure (public hearings, roundtables or conferences, etc).

Example 2: *In 2006 a supplementary State environmental impact assessment was carried out by the Working Group for creating a Danube – Black Sea shipping canal on the Ukrainian part of the Delta. In order to involve the public, the Ministry for Environmental Protection passed the documentation for this construction to the Aarhus Centre to inform the public and receive their comments. EPL [«Environment – People – Law»] took part in an environmental impact assessment and sent its critical comments on the planning material for the second phase of the canal. However, despite the criticism from the public, the Ministry gave a positive opinion of the supplementary State environmental impact assessment, nor in the Opinion was any mention made of comments from the public or an explanation given as to why public opinion had not been taken into consideration. This demonstrates that for the Ministry for Environmental Protection, public participation is a mere formality.*

Since this is unlawful and an infringement of one of the principles of environmental impact assessments – taking public opinion into consideration – EPL lodged an appeal with the court against the 2006 Environmental Impact Opinion. At present proceedings on this administrative case are underway in the Lviv Regional Economic Court, and no judgment has yet been passed. However the purpose of the court case is to teach the Ministry for Environmental Protection that more than simply formal rituals as regards ensuring public participation and receiving comments and criticism from members of the public are needed, and that they are obliged to properly take these opinions into consideration.

Recently civic organizations, as well as private individuals, have been actively endeavouring to assert their right to take part in discussion, and proposals have been submitted for draft normative legal acts, strategies and programmes. This right is not adequately achieved in Ukraine since draft normative acts and strategic development documents are not made widely available and in good time. Only isolated draft normative acts are to be found on the websites of the relevant ministries or the Verkhovna Rada.

Example 3: *On 11 October 2006 National Deputies O. Holub and B. Bespaly tabled in the Verkhovna Rada draft law № 2313 «On amendments to the Law «On environmental impact assessments» (on increasing the powers of the public and extending the list of items subject to environmental impact assessment). The authors believe that the present law on environmental impact assessments does not adequately provide for effective State assessments and leaves out too many types of activity and sites which are of heightened environmental danger. It also restricts public participation and the impact of the latter on the process of decision-making on environmentally important issues (this violating people's constitutional right to live in a favourable natural environment), and there are places where it runs counter to international legal documents. Due to shortcomings in legislation and the fact that the public do not have the opportu-*

nity to exert control and impact on State environmental impact assessments, such assessments have over recent times been turning into an empty formality, with it being possible to order the eventual Opinion.

Overall the new features of this draft law can be considered positive. However it is to be regretted that neither the Verkhovna Rada, nor the Ministry for Environmental Protection have put it forward for public discussion, and for amendments and proposals to be submitted, and the draft law has not been published on official websites. Over more than half a year the Verkhovna Rada demonstrated no interest in considering it. As of the end of April 2007 it had not been reviewed in plenary session.

The Ministry for Environmental Protection only publishes on its website information about some draft normative legal acts which it has itself drawn up. The website, however, does not contain any additional information pertaining to the opportunity and procedure for commenting on these draft laws. The process of giving feedback on such drafts is therefore rather languid and ineffective.

Example 4: A number of public lobbying actions aimed at changing government policy towards greater consideration of environmental issues took place in 2005 – 2006 initiated by the environmental organization «MAMA – 86». A good example of such public lobbying was participation in the Presidential Hearings «Challenges posed by freedom» on 26 November 2005. The address from environmental civic organizations contained as its main thesis the demand that the President make environmental policy in Ukraine a priority, as befits the present state of crisis in the environment and health. On the suggestion of the President, it was proposed that civic organizations prepare the relevant suggestions. To achieve this, a working group was formed with representatives from the All-Ukrainian Environmental League, Zeleny Svit [Green World], the National Ecological Centre of Ukraine and «MAMA – 86». At the beginning of 2006 the working group prepared a draft Presidential Decree «On urgent measures to increase prioritization of environmental policy».

In order to create the appropriate conditions for exercising the public's constitutional right to an environment which is safe for life and health, the draft Presidential Decree proposes recognizing environmental policy to be one of the main priorities in Ukraine's governmental policy. The Cabinet of Ministers is called upon to draw up and submit for consideration in the Verkhovna Rada by 20 June 2006 a draft National Action Plan on Environmental Protection for 2006 – 2015. which will envisage measures on mandatory integration of environmental policy in all areas, including: the use of strategic assessment of the impact on the environment; development of environmental education and awareness-building; implementation of procedures and mechanisms for informing the public and for public participation in decision making on environmental matters; drafting amendments to the Administrative and Criminal Codes through increasing liability for breaches of environmental protection legislation; drawing up a draft Programme for institutional strengthening of State governance in the area of environmental protection and others.

The draft Decree was submitted to the President's Secretariat in January 2006 however there has still not been an official response.

Example 5. Another civic initiative we should mention comes from the historic town of Kamyanets-Podilsk and involved response to the planned construction of a plant for cold-rolling and hot galvanizing processing lines at the «Module» enterprise, a former light metal industry plant.

Throughout 2005 and 2006 the process continued of drawing up and agreeing the plan with various controlling bodies, including the Khmelnytsky Regional Sanitary and Epidemiological Service and the Khmelnytsky Regional Department for the Environment and Natural Resources. On 6 July 2006 the City Council Executive Committee issued a permit for the plans.

However, given the strong concern felt by local residents over the possible consequences for the environment and health, the Society for Podilsk Environmental Researchers and Nature Lovers organized an independent environmental impact assessment of the plans, taking into consideration the planned location (within the town) and chemical substances involved.

On 18 January 2007, the results of the assessment were announced at a meeting with the Town Mayor. The assessment points to numerous violations of environmental legislation and decision-making procedure. On 12 February the results were made known to a public meeting in the town cultural centre.

As of May 2007 an initiative group had been created to hold a town referendum on whether an environmentally dangerous construction should be built within Kamyanets-Podilsk.

***Example 6:** At the end of 2005 a civic movement «Zeleny Maidan» [«Green Maidan» – literally green square] was founded. This is a voluntary non-political movement with the general aim of raising the priority of environmental policy so that Ukraine can move in the direction of balanced environmental policy.*

On 18 July 2006 the flag «Zeleny Maidan» was raised over a campaigning tent on Maidan Nezalezhnosti [Independence Square]. The action which lasted 12 days had the support of 22 environmental organizations. In that time more than 5 thousand people visited the tent. On 27 July 2006 participants in the Zeleny Maidan action held a picket outside Ukraine House in Kyiv where the Cabinet of Ministers was giving a public presentation of its work over the first half of 2006. Ukrainian environmental civic organizations expressed their indignation over cases where the Government had violated environmental legislation or had not implemented international commitments, as well as over plans to accelerate development of nuclear energy. That same day near the President's Secretariat members of the Zeleny Maidan action reminded the President of the draft Presidential Decree «On urgent measures to increase prioritization of environmental policy» and submitted it to the Secretariat. No response has yet been received.

***Example 7:** A public campaign aimed at changing government policy priorities in the area of energy was initiated by MAMA-86 and the National Ecological Centre of Ukraine [NECU]. In the process of preparation and organization of the action an open union of Ukrainian civic organizations was formed «For sustainable energy».*

When shortly before the twentieth anniversary of the Chernobyl Disaster the conclusions of the UN Chernobyl Forum, the International Atomic Energy Agency (IAEA) and the World Health Organization (WHO) were released and the Government of Ukraine took the decision to prioritize development of nuclear energy and adopted Ukraine's Energy Strategy up to 2030, Ukrainians were faced with the real risk that the Chernobyl programmes would be folded, and 22 new nuclear power plants built without their consent and at their expense.

At the initiative of MAMA-86, on 20 September 2005 41 environmental organizations addressed an appeal to the President in which they protested against the conclusions of the IAEA / WHO experts, and also called on the Ukrainian authorities to present an official position on this.

The first joint action by the Union «For sustainable energy» was the large-scale protest action: «NO to new nuclear power plants, YES to energy conservation!». This was held on 5 October 2005 outside the Cabinet of Ministers. Its co-organizers and participants were the National Ecological Centre of Ukraine, the Dniprodzherzhynsk Environmental Organization «Holos Pryrody» [«Nature's Voice»], MAMA-86, the city youth environmental organization «Ecoclub» (Rivne), Zeleny svit, the environmental and cultural centre «Bakhmat» (Artemivsk) and others. The key messages of the protest are categorical rejection of a nuclear energy future for Ukraine and protest at flagrant violations by the government of the Aarhus Convention. The demands were set out in an appeal passed to the then Prime Minister Yury Yekhanurov and sent to Ukraine's National Deputies. The immediate result of the October picket was a meeting on 24 November 2005 in the Ministry of Fuel and Energy between representatives of the NGOs who had organized the picket and the leadership of the Ministry at the level of the Deputy Ministry to discuss the draft strategy programme. The meeting did not, however, bring any direct results.

The next public protest carried out by the Union was directed against the statements of the then Prime Minister that there was no alternative for Ukraine but a nuclear future. In a widely publicized statement, leading environmental organizations pointed out that the public must take part in making decisions on such issues as the construction of new nuclear power plants.

In March 2006 MAMA-86 initiated design of a «Concept for a non-nuclear path of development of the energy industry in Ukraine». With its financial support, experts on alternative and renewable sources of energy were drawn in (the civic organization «Renewable Energy Agency» and the Scientific and technical centre «Biomasa», with the participation of member of the Verkhovna Rada Commission on Radiation Protection V.I. Usatenko). The co-authors of the alternative concept also included NECU, «Ecoclub», «Holos Pryrody» and «Bakhmat». The document presents a critical analysis of the Energy Development Strategy for Ukraine's energy industry and provides calculations proving that there is an option of rejecting nuclear sources of energy on condition that there is investment in energy conservation,

energy efficiency and renewable sources of energy. The Concept was released on 20 March 2006 at a press conference attended by members of the Union, and was sent to the top government authorities.

Environmental organizations demanded that the Cabinet of Ministers review the Energy Strategy, having first held full consultations and considered several alternative variants for the development of the energy sector in Ukraine. They also called on the public to support a petition against the strategy being proposed for the development of a fuel and energy complex and to collect signatures. Approximately 22 thousand people signed the petition, with 13 thousand of these being collected by MAMA-86 and another 9 thousand by the All-Ukrainian Environmental League and other Ukrainian environmental organizations.

On 23 March 2006 during the presentation of Ukraine's Energy Strategy, attended by the President, the anti-nuclear Union of civic organizations distributed their information material among the participants.

From 23-25 April 2006 to mark the twentieth anniversary of the Chernobyl tragedy, an international conference was held in Kyiv «Chernobyl + 20: Remembrance for the Future». It was attended by independent scientists, environmental specialists, civic organizations and experts on balanced forms of energy from all over the world. On 24 April 2006 representatives of the anti-nuclear Union and members of the conference took part in a picket (organized by «Holos Pryrody») outside the National Opera House where a government conference to mark the anniversary was taking place in the presence of high-ranking officials.

On 27 April 2006, at the initiative of the office of the Cabinet of Ministers an Internet conference was held entitled «Government officials and environmentalists discuss Ukraine's Energy Strategy for the period up to 2030». Representatives of the government were forced to hold this by the longstanding struggle by Ukrainian environmental organizations against the adoption of this strategy without proper public discussion.

Experts from independent organizations prepared and in September 2006 circulated the analytical documents «Criticism of the Energy Strategy provisions» and the «Concept for a non-nuclear path of development of the energy industry in Ukraine». These elicited public dialogue on the advisability of the scenario proposed in the Energy Strategy involving scientific experts, civic organizations and bodies of local self-government.

For example, a meeting of the Ternopil Regional Council on 9 October 2006 sent an official appeal № 35791/4/1-06 to the Cabinet of Ministers. In it they state that the adoption of the Energy Strategy had not been preceded by wide-scale public discussion as demanded by the Aarhus Convention, ratified by Ukraine and by the Law «On the use of nuclear energy and radiation safety». The Ternopil Regional Council considers that the Energy Strategy needs to be worked on and requires wide public debate, and suggests that the Cabinet of Ministers initiates and runs public hearings in Ternopil on Ukraine's Energy Strategy up to 2030», later taking their conclusions into consideration when working on and implementing the Energy Strategy.

Unfortunately, the Energy Strategy was approved without alternatives being presented. The key public officials who were responsible for preparing and holding public discussions have accused environmental civic organizations of having become involved in the process too late. They have produced an incredible list of measures for consulting the public, with seminars, roundtables, hearings etc. A glance at the list of participants in such events makes it possible to conclude that energy industry specialists and the relevant representatives of government bodies talked among themselves, without involving those with alternative views or the public. As a result of the lack of wide information, as well as insufficient clarity in legislation stipulating the format of holding consultations with the public, especially as regards public hearings, it is fairly difficult to prove professional negligence as far as involving the public in decision-making on the Energy strategy is concerned.

Observance of the public's right to participate in decision-making on issues of environmental impact during 2006 did not show any notable improvement. The exercising of these rights does, however, to some extent depend on the level of activeness of members of the public themselves, and this level needs to be improved through environmental and legal awareness-raising and demonstrating positive experience where people have succeeded in making impact on environmental awareness. To properly safeguard the right to public participation improvements are needed to the normative legal base with respect to the mechanisms, procedures, format for holding such events

and for presenting the results of consultation with the public. This in particular concerns access to the public of information at the early stages, the presentation in summary documentation of alternative points of view and the definition of the format of public hearings.

2.1.3. Access to justice on environmental matters and environmental rights

Legal relations arising in the area of environmental protection and environmental rights fall within the jurisdiction of Ukrainian courts. Ukrainian citizens are entitled to approach the courts where their rights, freedoms and interests have been infringed. This is set down in the Civil Procedure Code (Article 3) and the Code of Administrative Justice (Article 6).

A separate category of cases involve defending ones right to information. This right is enshrined both in the Constitution and in various laws, and its is defended in administrative courts according to the claimant's location in cases of unlawful refusal to provide information by public authorities, bodies of local self-government or their officials according to the rules of the Code of Administrative Justice. One may thus lodge a claim against an unlawful refusal to give information, failure to provide information in the legally stipulated time-frame, or other unlawful behaviour or failure to act, linked with access to information.

The most objective means of evaluating access to justice is to study actual civil suits. This makes it possible to find out who approaches the courts and why, to ascertain impediments, improve the procedure for lodging claims, ensure fair hearings, establish the basic level to use when comparing and defining judicial effectiveness and public confidence in judicial and legal institutions, as well as developing the relevant strategies for increasing the level of access.

Example 1: *EPL [Environment – People – Law»] achieved an important judgment in the Lviv Regional Economic Court of Appeal on an individual suit brought against the Ministry for Environmental Protection. The judgment declared unlawful the practice of the Ministry in refusing to provide copies of scientific environmental expert assessments which are an integral part of the opinions of State environmental impact studies. EPL had sent an information request to the Ministry asking for a copy of the environmental impact study on the construction plan for the Danube – Black Sea Canal and the scientific environmental expert evaluation of the Environmental Impact Assessment [EIA] material for this plan. The organization's request was turned down on the grounds that the given scientific assessment was the intellectual property of those who had commissioned it. The Court of Appeal accepted the position presented by EPL, that the refusal to provide the copy had been unlawful since such an assessment is a decision of a State body (a component part of the opinion of the State environmental impact study) and is therefore to be provided on request. With this court ruling coming into force, the Ministry finally provided EPL as requested with a copy of the environmental impact study on the construction plan for the Danube – Black Sea Canal. This ruling is extremely important given the Ministry's persistent refusals to provide scientific environmental expert evaluations.*

One of the judicial mechanisms for defending the public's right to participate in decision-making of environmental importance is by appealing against decisions taken without taking public opinion into consideration. For example, the public is often deprived of the possibility of taking any part in the process of carrying out a State environmental expert study because of the lack of clear procedures, the unwillingness of the public authorities to encourage and facilitate such participation, as well as for other reasons. This results in the public being presented with an already approved Opinion from the environmental impact study. In such cases it is a good idea to lodge an appeal against decisions made with infringements of the public right to participate in such decision-making to either have the action or lack of such declared unlawful and prompt the relevant government body to rectify the situation (if it is not too late) or to ask the court to ensure that the unlawful behaviour by public officials is changed in the future.

Court proceedings in such cases take place, as mentioned, in administrative courts according to where the claimant is located which is quite convenient and enables saving on the transport and board costs where courts are elsewhere.

Example 2: *In 2006 EPL lodged an appeal with the court asking that the Opinion of the State environmental impact study on phase two of the Danube – Black Sea Canal invalid on the grounds that a fundamental principle of such assessments had been breached, this being the need to take public opinion*

into consideration. As a result of their analysis of the EIA material on the construction of phase 2 of the Canal, submitted for State environmental impact study, EPL had prepared critical comments and provided irrefutable proof of breaches of both domestic legislation and a number of international conventions in the process of building the Danube – Black Sea Canal. The EPL evidence and arguments were neither reviewed nor reflected in the expert conclusion. The material of this environmental impact study makes no mention of the EPL comments nor does it provide any explanation as to why these have not been taken into consideration. The court proceedings into this case are still continuing.

As a rule there are no great difficulties in turning to the courts where there have been violations of people's environmental rights through the actions or omissions of public authorities. Yet how does one convince the court in cases where there have been no such violations by those authorities? The Aarhus Convention affirms the public's right to turn to the courts in order to appeal against the unlawful decision of one of the parties with official authority, which runs counter to environmental protection legislation. Yet practice shows that Ukrainian courts at present are reluctant to apply the provisions of the Aarhus Convention.

Example 3: *In 2006 EPL appealed against the Opinion of the State Environmental Impact Study on the construction plan for the Tashlyk Hydro Accumulating Power Station on the grounds that the implementation of the project would lead to the flooding a part of the territory of the regional landscape park «Granite-Steppe Pobuzhya», the destruction of precious species of flora and fauna protected by Ukrainian law. In the absence of a representative of EPL, the court took the decision to reject the appeal on the grounds that the period for lodging it had been breached, and also questioned the possibility of civic organizations lodging such claims with the court in cases where their rights had not been violated by the decision in question. The court ruling demonstrated the unwillingness of judges to look deeply into the details of a case, especially where this is linked with analysis of scientific research, documents and the existence of the presumption of legality of decisions by the public authorities.*

However there has also been positive experience of court appeals against the decisions of the authorities which infringe land or environmental legislation. This applies also to civil suits brought by individuals against the decisions of public authorities or bodies of local self-government which violate citizens' interests.

Example 4: *In 2006 EPL lodged a claim with the court against the Cabinet of Ministers Resolution on disposing of State-owned land belonging to the reserve territory of «Granite-Steppe Pobuzhya» in the Mykolaiv region[5]» EPL is arguing that its interest in retaining the natural reserve fund of Ukraine have been breached by the Cabinet of Ministers decision. The court accepted the civil claim and considered it without disputing the right of civic organizations to appeal against resolutions of the Cabinet of Ministers on land issues. The case is presently under examination in the Mykolaiv Regional Court of Appeal.*

Example 5: *With legal accompaniment from EPL, residents of the city of Mykolaiv A.H. Halkin and Ol. Malytsky lodged a civil suit to have the decision of the Mykolaiv Regional Council on changing the borders of the reserve territory of «Granite-Steppe Pobuzhya» and removing 27,72 hectares of land from the regional landscape park to join to the Alexandrovsky Reservoir on the river Southern Bug. The local court allowed the claim by the two residents who had demanded that the unlawful decision be revoked, arguing that their right to general use of nature and right of State ownership of natural resources had been violated. We thus see that individuals succeeded in standing up for their right to natural resources of national significance – the Southern Bug River with its flora and fauna in order to stop the land being flooded by the Alexandrovsky Reservoir.*

A separate and important category of court practice is seen in civil suits in defence of people's constitutional right to a safe environment and to compensation for damages sustained through violation of this right. There can, however, be difficulties in proving a cause and effect link between the pollution and the moral or material damages. This kind of court case often involves the need for a forensic medical examination which leads to additional expense for the claimant. This prevents people who are suffering the adverse effects of pollution of claiming moral or material damages due to the pollution. Without a specialist forensic medical assessment the size of compensation for

[5] Resolution No. 841 from 20.06.2006 handed over the land for the permanent use of the State «National Atomic Energy Company» Energoatom, with amendments to the designated purpose of the reserve lands (translator)

damages awarded by the court is often not adequate to recompense the actual change in the victim's state of health.

Item e of Article 21 of the Law «On protection of the natural environment» allows civic environmental associations the right to lodge compensation claims with the economic court for damages sustained as the result of violations of environmental legislation, including damage to individuals' health and to the property of civic associations. However there is a category of cases «closed» for participation by individuals or civic organizations. This involves civic suits filed in the interests of the State or of a territorial community by the relevant empowered bodies. For example the State departments for environmental protection in the regions may file compensation claims for damages and expenses incurred as the result of a violation of environmental legislation, as well as suits to have environmentally hazardous activities stopped or suspended. Unfortunately, individuals and civic organizations are only allowed to attend such court proceedings. They may submit explanations or evidence to the court but they do not have the status of parties to the court proceedings which substantially limits their procedural rights. Only where the court allows an application from one of the parties to involve individuals or civic organizations in the procedure as a third party on the side of the claimant who is not presenting independent claims with respect to the dispute, can the public gain access to a wide range of procedural rights, including the right to appeal the court ruling according to legally stipulated procedure. Sometimes in defending their right of access to justice civic organizations are forced to turn to higher-level courts.

Example 6: *On 5 March 2007 the High Administrative Court of Ukraine passed a decision to institute cassation proceedings over the claim by the civic organization MAMA-86-Odessa against the ruling of the Odessa Economic Court of Appeal from 4 April 2006.*

This case arose over a large-scale construction plan, the so-called «boat station» in the natural flood lands of the Dniester River near the village of Mayaki and the Opinion of the State department which did not agree a working plan for the boat station.

In examining the case in the Odessa Regional Economic Court several civic organizations from Odessa and the Odessa region applied on the basis of norms of the Aarhus Convention and the Code of Administrative Justice to be included as third parties to the proceedings. Among these were MAMA-86-Odessa, the Natural Legacy Fund, the Vernadsky Youth Environmental Centre, the civic organizations Vidrodzhennya and the Socio-Environmental Union. However both the Odessa Court of Appeal and the Economic Court turned the civic organizations down due to «a lack of sufficient interest». The decision to turn them down was appealed in the Odessa Regional Court of Appeal however this court refused to institute appeal proceedings.

The Civil Code stipulates that the activities of an individual or legal entity which lead to the destruction, damage or pollution of the environment are unlawful. Each person is entitled to demand that such activities be suspended, and such activities can be stopped by court order. This means that there is no requirement in the given case that the said activities infringed the rights of a specific individual. Therefore each member of the public, regardless of whether he or she is personally affected by the activities, has an interest in preserving the environment, and therefore the right to seek a court ruling suspending the activities.

An analysis of the present situation with access to the court by individuals and civic organizations shows a fairly weak level of activity in this direction and a lack of confidence in judicial bodies. A major constraining factor is the lack of legal aid and financial resources for lodging a civil claim. Civic organizations and individual members of the public often lack sufficient legal knowledge, or the financial resources to pay for a lawyer, and therefore more often seek to resolve environmental problems without recourse to the courts.

There is also a relatively small number of cases considered by the courts involving compensation for environmental damage or criminal proceedings into crimes against the environment (Articles 236 – 254 of the Criminal Code).

Example 7: *In response to a formal information request from Zeleny Svit, In Letter № 380/01-07 from 09.02. 2007 the State Judicial Administration provided statistical information regarding court cases in 2006.*

The data shows that during the year local general courts considered 1,059 cases under Article 236-254 of the Criminal Code, with 1,023 individuals being convicted. The huge difference in the number of such cases when broken down into regions is striking.. For example, whereas in the Luhansk region 119 charges involving crimes against the environment were considered and in the Ivano-Frankivsk region – 94, the numbers in the Zhytomyr region was 6; Lviv region – 11, and in the cities of Kyiv and Sevastopol, the figures were 8 and 5 respectively. The largest number of cases considered and convictions related to Articles from the Criminal Code No. 249 («Illegal fishing, poaching of wild animals or other water-related poaching business») and No. 246 («Illegal forest felling»), 400 and 340 cases respectively. The smallest number of cases – two in all – involved Article 252 («deliberate destruction or damaging of territory under State protection, and of parts of the Nature Reserve Fund»).

There were virtually no criminal proceedings over crimes against the environment in appellate courts. The State Judicial Administration has only two such cases recorded, in the Volyn region.

During 2006 the courts considered 3,444 compensation claims for damages incurred through infringements of environmental legislation. The greatest numbers were in the Transcarpathian and Zaporizhya regions (334 and 343 cases, respectively), while the smallest number were in Kyiv – 6 cases. 2,480 claims were allowed, with the overall amount of compensation awarded coming to over 125 million UAH. The State Judicial Administration's letter gives no information as to how much of the compensation has in fact been paid.

At the same time the Prosecutor General , responding to an information request from Zeleny Svit on the number of civil claims lodged by individuals over infringements of environmental legislation, as well as criminal proceedings under Articles 236-254 of the Criminal Code instituted and submitted by prosecutor's offices to the courts, did not deem the information requested to come under the category of environmental information and refused to provide it (Letter from the Prosecutor General № 07/4 – 111-07 from 30.01. 2007).

We should not forget that the safeguarding of environmental rights, including via legal remedies, is the function and responsibility of the State. This is clearly articulated in Article 16 of the Constitution, and Articles 5, 10, 11, 37 of the Law «On protection of the natural environment». Article 11, for example, affirms the State's guarantee of its citizens' environmental rights as enshrined in legislation, and obliges structures within the Ministry for Environmental Protection to provide members of the public with comprehensive assistance in exercising these rights.

According to Article 121 of the Constitution the Prosecutor supervises observance of human rights and civil liberties. Article 37 of the Law «On protection of the natural environment» stipulates that the prosecutor's office may approach the court «with compensation claims for damages resulting from infringements of environmental legislation, or seeking suspension of environmentally hazardous activities».

One should perhaps understand that members of the public may also submit to the prosecutor's office claims in defence of their right to a safe environment, to compensation for damages sustained as the result of environmentally hazardous activities, as well as to have criminal proceedings instituted, at least those under Articles 236, 237, 238, 244, 253 of the Criminal Code which are investigated by the Prosecutor. Cases when the Prosecutor represents individual members of the public in court are reasonably clearly set out in legislation. As a rule they involve minors, those mentally unfit, or others who are not able to represent themselves. The prosecutor's office would accordingly respond to such claims by appearing in court on behalf of the citizens whose environmental rights have been violated. Unfortunately, we know of virtually no precedents for such activities by the prosecutor's office.

Summarizing the facts set out in this section, one can conclude that the provisions of the Aarhus Convention and of Ukrainian laws on ensuring access to environmental information, public participation in decision-making and access to justice on environmental matters were not properly enforced during 2006. The conditions to ensure their full and effective enforcement have yet to be safeguarded, and the procedures and mechanisms are inadequately developed. The circle of authorities answering for the right to receive environmental information in Ukraine is artificially squeezed into the frame of the insufficiently influential Ministry for Environmental Protection and its regional departments.

The few laws and subordinate legislation passed in Ukraine in implementation of the provisions of the Aarhus Convention in fact diminish the possibilities for citizens to exercise their constitutional right to receive environmental information and limit the role of the public in the process of observance of the right to a safe environment.

These all contribute to the violation of people's constitutional right to an environment which is safe for health and life.

3. PLANS WITH PARTICULAR IMPACT ON ENVIRONMENTAL RIGHTS

3.1. CONSTRUCTION OF THE CANAL THROUGH THE DANUBE BIOSPHERE RESERVE

The most prominent case involving the destruction of a natural reserve over recent years in Ukraine has been the construction of the deep-water Danube – Black Sea canal through the Bystroye Estuary on the territory of the Danube Biosphere Reserve. The process of building this canal has brought with it infringements not only of a number of provisions of domestic legislation, but also international agreements which Ukraine is a signatory to, namely: the Bonn Convention on the Conservation of Migratory Species of Wild Animals; the Convention on Cooperation in the Protection and Stable Use of the Danube; the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, the Bern Convention on the Conservation of European Wildlife and Natural Habitats and the Aarhus Convention.

The public campaign against this project was a milestone for the changes taking place in Ukrainian society. The vast scale of the destruction of a natural reserve which is under the protection of UNESCO was not opposed by the National Academy of Sciences, nor natural sciences circles, but almost exclusively by environmental civic organizations. As the Director of the reserve, Oleksandr Voloshkevych put it, the reserve's only allies proved to be civic society.

The campaign last from 2001 thanks to the active role played by a group of civic organizations: «Pechenihi», «Environment – People – Law» [EPL], the Odessa branch of the International Socio-Environmental Union and the Kyiv Environmental and Cultural Centre. In 2006 EPL lawyer Olha Melen became the first Ukrainian to receive the Goldman Prize, the most prestigious prize in the world awarded to civic figures for their exceptional achievements in environmental protection. At official level the event was simply ignored.

At a meeting with journalists from Odessa, the Minister for Transport and Communications B. Bondar stated that the income from the exploitation of the canal did not cover the cost of its upkeep. Therefore, he believed, it needed to be decided whether the canal was a commercial project which must bring a profit, or a political project.[6]. With regard to the «political» nature of this project, it should be noted that despite clear violations in its implementation of a number of international agreements and the damage to Ukraine's image in the world, during 2005 and 2006 one of its main lobbyists in Ukraine was the Ministry of Internal Affairs. The project was also actively lobbied by other public officials and politicians, for example the Speaker of the Verkhovna Rada V. Lytvyn., the Minister for Transport Y. Chervonenko and the Head of the Odessa Regional Administration V. Tsushko.

In July 2006 the results of an Accounting Chamber audit on environmental measures carried out in 2004 and 2005 while constructing the deep-water canal was published. The audit showed that the Cabinet of Ministers had not ensured adherence to legislation nor control over observance of environmental safety requirements. It had failed to carry out effective and comprehensive measures to protect the natural environment during the construction of the canal. The auditors noted that the actions of the Cabinet of Ministers, the Ministry for Transport and Communications and the Ministry for Environmental Protection on resolving the issue of restoring the deep water shipping route had been unsystematic and inconsistent. The audit found that the planned spending on construction of the canal had been exceeded by 12.3 mil-

[6] http://www.ara.com.ua/onenews.php?oid=5211

lion UAH. At the same time the objective in creating the waterway had not been achieved and ship passage had been suspended. By the date when the canal was officially opened for use, measures of the protection of the environment had not been carried out. 71 million UAH had been used inefficiently.

The Accounting Chamber concluded that the present system for environmental monitoring had not provided the information needed for the process of designing and constructing the deep-water canal and had rendered it difficult to make optimum design decisions. It had furthermore prevented the public authorities, bodies of local self-government, civic and international organizations from receiving well-founded, objective and trustworthy information about the state of the environment and had failed to avoid a negative reaction from the international community to the canal's construction.

During 2005 and 2006 the public authorities in Ukraine continued to exert pressure on the reserve. This pressure had begun earlier. From 2003-2004 more than 20 fiscal checks were carried out, some of them lasting up to two weeks. Not only of the checks uncovered any irregularities. In November 2004 in response to a letter from the Director of the state enterprise «Delta-Lotzman» V. Bezdolny the Odessa Regional Prosecutor launched a criminal investigation against staff of the Danube Biosphere Reserve «over a case of abuse of official position». The investigation was terminated in 2005 when the reserve won a court case on this issue against the Odessa Regional Prosecutor. In general, all of 2005 passed peacefully for the reserve. However in February 2006 the Regional Prosecutor re-launched the criminal investigation.

The unclear situation over the further fate of the canal radically changed after the 2006 parliamentary elections and the appointment of a new Cabinet of Ministers. By 18 August the new Minister for Transport and Communications M. Rudkovsky had reinstated V. Bezdolny in his post as Director of «Delta-Lotzman». The latter had been dismissed on 7 July 2005 following a series of machinations which cost the government more than 100 million UAH.

On 3 October 2006 the latest campaign of public disinformation began with the newspapers flooded with material about the economic viability of the canal through the Bystroye Estuary and its supposed harmlessness. It is typical that top figures in the country took part in the campaign, including the First Deputy Prime Minister M. Azarov who threatened journalists and hinted that critics of the canal through the Bystroye Estuary were working for the Romanian government.[7]

On 30 October the Minister for Environmental Protection V. Dzharty suggested to the President of the National Academy of Sciences B. Paton that the Danube Biosphere Reserve be placed under the jurisdiction of his Ministry. He asserted that such a transfer was expedient because the Reserve did not have land documents. The Academy of Sciences rejected the Minister's suggestion.

On 24 November the official newspaper «Holos Ukrainy» published an Environmental Impact Statement regarding the consequences of building and using the deep-water canal which began the official State expert environmental analysis of the plan. Before the adoption of the Environmental Impact Opinion, dredging of the Bystroye was restarted, with 13 million UAH being allocated from the State Budget for it. On 20 December «public hearings» in support of the project were held at Izmail. The official organizer of these «hearings» was the Izmail City Council, unofficially they were arranged by Delta-Lotzman. The preferences and specific features of the organizers were reflected in the nature of the «hearings» – partisan and biased, and aimed at deceiving the communities living near the Danube.

The situation by the end of 2006 with regard to the deep-water Danube – Black Sea canal was almost identical to that at the end of 2004. In concluding this analysis, one should note several particular features. This project is distinguished by its virtually uncontrolled options for using State funding (it being impossible to check the real scale of the dredging work). All Ukrainian governments have had a vested interest in this, regardless of their political orientation. Political preferences have been reflected in the forms of lobbying for the project.

[7] http://www.unian.net/ukr/news/news-170901.html

3.2. CONSTRUCTION OF THE TASHLYK HYDRO ACCUMULATING POWER STATION AND THE DESTRUCTION OF THE REGIONAL LANDSCAPE PARK «GRANITE-STEPPE POBUZHYA»

In formal terms the problem is over conflict between environmental and «economic» interests in implementing the planned construction of the Tashlyk Hydro Accumulating Power Station {HAPS]. This envisages further raising of the water level in the Alexandrovsky Reservoir which will lead to the flooding of land on the regional landscape park «Granite-Steppe Pobuzhya» (if the water level is raised by 20.7 metres, this will flood around 870 hectares). Under threat of being flooded are also monuments of historical and cultural heritage, including the Gard Tract which is the last authentic landscape from the time of the Zaporizhyan Sich [the fortress of the Zaporizhyan Cossacks on the Khortytsa Island].

The Tashlyk HAPS is being built without a positive Opinion from the State environmental impact study. The conditions given in the expert opinion of the Ministry for Environmental Protection in 1998 have still not been carried out. In total, this project has infringed over 20 normative legal acts on the environment, including the Laws «On protection of the Natural Environment», «On the Nature Reserve Fund of Ukraine» and ««On environmental impact assessments».

The thing that stands out in this project is the fact that it received a negative assessment from competent government bodies: the Ministry for Environmental Protection, the Ministry of Culture and the Prosecutor General. Despite this, it is continuing to be implemented with financing from the Special Fund of the State Budget.

The Ministry for Environmental Protection's position: From 10 to 15 October 2005 the builders of the Tashlyk HAPS carried out illegal land work on the territory of the regional landscape park «Granite-Steppe Pobuzhya». The work was carried out on the left bank of the Pivdenny Bug [Southern Bug] River at river level near the Gard Tract, and was stopped through an order from the regional Department for the Environment and Natural Resources.

In spring 2006 Ministry of Fuel and Energy engineers raised the water level in the Alexandrovsky Reservoir resulting in a part of the regional landscape park being flooded and causing deterioration in the state of the nature complex. In doing this, the Ministry of Fuel and Energy breached a number of environmental normative legal acts, including the Laws «On the Nature Reserve Fund of Ukraine» (Article 7); «On the animal world» (Article 39); «On the plant world» (Article 27); «On Ukraine's Red Book» (Article 11) and «On protection of cultural heritage» (Articles 22, 24, 30, 37). Liability for such actions is set down in Article 252 of the Criminal Code («deliberate destruction or damaging of territory under State protection, and of parts of the Nature Reserve Fund»), as well as Articles 90 (infringement of the norms for the protection of animals and plants in Ukraine's Red Book) and 91 (infringement of the rules for the protection and use of territory and objects of the Nature Reserve Fund) of the Code of Administrative Offences. The decision was taken against the position of the Ministry for Environmental Protection that the water level at the Alexandrovsky Reservoir must not be raised by 14.7 metres.

Pursuant to Article 123 of the Land Code, the Ministry for Environmental Protection and the Mykolaiv Regional State Department for the Environment and Natural Resources had examined the plans for passing land into the permanent use of the State Enterprise NNEGC [National Nuclear Energy Generating Company] Energoatom for the locating of the tail end of the Alexandrovsky Reservoir within the boundaries of the regional landscape park and had not approved them.

The Ministry for Environmental Protection provided the public with the Act for the check carried out to ascertain whether Energoatom had complied with environmental legislation when constructing the Alexandrovsky Reservoir. The check was undertaken by the State Environmental Assessment Inspectorate from 16-19 May 2006. The act, for example, states that in a letter from 06.04.2006 № 05/460 the Mykolaiv Regional State Department for the Environment and Natural Resources had called upon the management of AtomEnergoBud [a supposedly independent subdivision of Energoatom] to immediately set about reducing the water level of the Reservoir to its normal level of 8 metres and to agree a schedule for achieving this by 10.04.2006. The Acts and the orders of the Mykolaiv Regional State Department were ignored.

On 1 June 2006, at a special meeting of the Ministry for Environmental Protection Public Council, the Minister P. Ihnatenko released information about the last meeting of the Cabinet of

Ministers on that issue. The Minister stated that the issue had been reviewed with infringements of procedure, and the decision had been taken virtually on a show of hands, with members of the Cabinet not having been provided with the relevant documents. Despite the objections of the Deputy Prime Minister V. Kyrylenko, the Minister for Environmental Protection P. Ihnatenko, the Minister for Culture and Tourism I. Likhovy, as well as protest from the Deputy Prosecutor General T. Kornyakova, the issue had been approved by the overwhelming majority present. The objections to the decision were linked with the unique importance of the territory which would be flooded, both from an environmental and a cultural and historical point of view. The Prosecutor General's protest was over numerous breaches of legislation on the environment and on protection of historical and cultural heritage.

Finally, the Ministry for Environmental Protection with a letter from 29.05.2006 had not agreed the draft Resolution of the Cabinet of Ministers «On handing into permanent use land for social and other needs, with amendments to the designated purpose of the land», which transferring land of the regional landscape park to Energoatom, that is, for the flooding of the Gard Tract. Despite opposition, the Mykolaiv Regional Council had on 17 March 2006 with Decision No. 3 agreed the plans to transfer the land. Material on the issue was handed by the Ministry for Environmental Protection to the Prosecutor General.

On 20 June 2006 the Cabinet of Ministers officially approved the transfer of this land through its shameful Resolution No. 841 «On transferring land for permanent use». The Resolution was adopted with infringements of virtually all possible procedure, with members of the Cabinet not having been provided with the relevant documentation, where some members of the Cabinet were categorically against it, and without the Ministry of Justice having assessing its legality.

The position of the Verkhovna Rada: The Resolution of the Verkhovna Rada № 565-IУ from 20.02.2003 «On recommendations to hold parliamentary hearings on adherence to environmental legislation» (Item 15) recommended that the Cabinet of Ministers take measures to prevent implementation of economic projects at the expense of territory from the Nature Reserve Fund. With Verkhovna Rada Resolution № 609-IУ from 06.03.2003 «On recommendations to hold parliamentary hearings «The flooding of land in Ukraine: problems and ways of overcoming them» (Item 12) the Cabinet of Ministers was called upon to ensure the preservation of the regional landscape park «Granite-Steppe Pobuzhya».

The question of the environmental consequences of building the Tashlyk Hydro Accumulating Power Station has been considered on several occasions in the Verkhovna Rada. One such occasion was in the Verkhovna Rada Committee on environmental policy, use of nature and the liquidation of the consequences of the Chernobyl Disaster hearings on ««Problems for the creation of a national nature park «Granite-Steppe Pobuzhya». (29.03.2005). The aim was to give deep and comprehensive review of implementation of the Law from 21.09.2000 № 1989-III «On approving a National Programme for forming Ukraine's environmental network for 2000-2015», with regard to the creation by 2005 of the relevant national nature park on the basis of the regional landscape park «Granite-Steppe Pobuzhya».. The participants in these hearings were unanimous in agreeing that a national nature park «Granite-Steppe Pobuzhya» was needed. No compromise was reached over the possibility of implementing a Revised Plan for the construction of the Tashlyk HAPS, which was linked with the removal and flooding of a part of the land of the regional landscape park.

However, the Verkhovna Rada, largely preoccupied in 2006 with sharing out their own powers, avoided any active measures in response to calls from the public and some local councils on the unlawfulness of removal and unacceptability of flooding the regional landscape park.

For example, the Ternopil Regional Council at its third meeting on 28 November 2006 passed a separate appeal calling on the Verkhovna Rada to not agree to the removal of Nature Reserve Fund land from the regional landscape park with its being handed over in order to be flooded. Articles 6 and 13 of the Land Code stipulate, after all, that it is within the jurisdiction of the Verkhovna Rada to agree issues linked with the withdrawal of especially valuable land. Pursuant to Article 8 of the Land Code, Regional Councils have the authority to dispose of land which is in the joint ownership of territorial communities. The Ternopil Regional Council therefore believes that the Mykolaiv Regional Council, lacking

the authority to dispose of especially valuable land owned by the State acted unlawfully by removing this land from the regional landscape park «Granite-Steppe Pobuzhya».

In response to this appeal, the Verkhovna Rada on 11 January 2007 claimed that «the Mykolaiv Regional Council, in reviewing this issue, did not infringe any environmental legislation. In this respect, it must be pointed out that it is not within the competence of the Verkhovna Rada to agree to the withdrawal of land of environmental designation. That is within the jurisdiction of the Cabinet of Ministers».

The position of the Prosecutor: The response to a letter from the National Ecological Centre of Ukraine to the Prosecutor General № 125-1/12 from 06.03.07 on infringements of legislation in the additional construction work at the Tashlyk HAPS indicates that on «5.05.2006 the prosecutor's office of the Mykolaiv region registered its protest with the Mykolaiv Regional Council, calling for the cancellation of the decision by the Council on 17.03.2006 No. 3 which agreed the land survey department's plan for handing land over for the permanent use of State Enterprise NNEGC Energoatom The said protest was rejected by the Mykolaiv Regional Council on 26.05.06 by a decision of the Council's meeting. Due to this the Regional Prosecutor lodged an application with the Mykolaiv Regional Economic Court on 26.06.2006 asked that the disputed decision be declared unlawful and revoked. The case in connection with the application was reviewed by the court on several occasions and was not allowed, however a judgment from the Odessa Economic Court of Appeal on 28.11.2006 revoked the ruling from the Mykolaiv Regional Economic Court and sent the case back for new examination. A resolution by the Mykolaiv Regional Economic Court on 11.12.2006 accepted the case for review, however up till now no judgment has been issued. The Mykolaiv Regional Council has yet to consider the protest of the Regional Prosecutor from 14.07.2006.

In implementation of Cabinet of Ministers Resolution № 841 on handing over sites of land for the permanent use of State Enterprise NNEGC Energoatom, through decision of the Mykolaiv Regional Council No. 10 on 06.07.2006, land with an area of 27.7 hectares was withdrawn from the regional landscape park and on 14.07.06 the prosecutor's office of the Mykolaiv region registered its protest calling for the cancellation of the decision by the Council on 06.07.2006 since it is in breach of legislation.

However the Prosecutor General did not appeal against the decisions of the central authorities, specifically Cabinet of Ministers Resolution № 841 on handing over sites of land for the permanent use of State Enterprise NNEGC Energoatom. Appeals for the Prosecutor General to do precisely that were sent on a number of occasions by civic organizations.

Position of the Ukrainian Accounting Chamber: As became clear from the response of the Accounting Chamber to an information request № 16-11 from 25 November 2006, checks of the legal use of money from the Special Fund of the State Budget allocated for the construction of the Tashlyk HAPS over the entire period of construction (25) have not been carried out. Nor does the work plan of the Board of the Accounting Chamber for 2007 envisage such a check.

The position of the public: in 2005-2006 environmental, historical and cultural, as well as tourist civic organizations carried out several dozen public events against this project. However the nuclear lobby proved stronger than the public and the authorities ignored public opinion.

In October 2005 at the initiative of the National Ecological Centre [NECU], a **nationwide civic campaign** was launched until the title **«YES to Gard!»** This was prompted by a visit made by NECU activists to Gard on 15-16 October. During this visit they registered infringements of environmental legislation – unlawful land work on the territory of the regional landscape park which was being carried out without any agreement. Following the intervention of the Ministry for Environmental Protection, the work was suspended and the material passed to the court. Fresh from this tour to Gard, on 19 October civic organizations and ordinary members of the public held a picket outside the Cabinet of Ministers premises, reminding Prime Minister Yekhanurov that 2 years earlier he, as one of 175 National Deputies, had signed an information request to the President on stopping violations to legislation as a result of the additional construction on the Tashlyk HAPS and the flooding of territory of the regional landscape park.

During the picket the participants signed and submitted to the Cabinet of Ministers office an open letter to Prime Minister Yekhanov with the following demands:

1. Suspend construction of the Tashlyk HAPS given that the results are not ready of a scientific study of the permissible effect of the building and functioning of the Tashlyk HAPS on the reserve of national and international significance – the National Nature Park «Granite-Steppe Pobuzhya», being created as per Instruction of the Cabinet of Ministers № 32797/3/1-05 from 4 August 2005.

2. Suspend any actions by the authorities of the Mykolaiv region and of the city of Yuzhnoukrainsk, the builders of the Tashlyk HAPS, etc, which are illegal and pose a threat to the regional landscape park «Granite-Steppe Pobuzhya», and which obstruct the creation of a national nature park with the same name, as envisaged by the Law «On approving a National Programme for forming Ukraine's environmental network for 2000-2015».

3. Hold a State environmental impact study on the Revised Plan for the construction of the Tashlyk HAPS taking into consideration the creation of a national nature park, amendments made to the Tashlyk HAPS after the study of 1997-98 and the provisions of the Aarhus Convention.

On 2 November 2005 members of the campaign «YES to Gard!» held a picket outside the Ministry of Fuel and Energy. They passed on a letter addressed to the Minister I. Plachkov regarding the systematic violation of legislation by «AtomEnergoBud», the enterprise South Ukraine Nuclear Power Plant Complex and NNEGC Energoatom in building the Tashlyk HAPS.

A few days later, on 9 November, NECU and the club «Four Sides» picketed NNEGC Energoatom protesting at the latter's consistent violation of Ukrainian legislation and procedure in the construction of the Tashlyk HAPS. The picket was specifically aimed at stopping illegal work by Energoatom on the territory of the regional landscape park «Granite-Steppe Pobuzhya». The picketers addressed an appeal to Y. Nedashkovsky, President of Energoatom, calling on him to stop the unlawful work being carried out by his people.

On 23 November another picket was held outside the Cabinet of Ministers calling for the creation of the national nature park «Granite-Steppe Pobuzhya» and a stop to the construction of the Tashlyk HAPS. Another letter was passed to the Cabinet of Ministers. During the next few days press conferences were held in Mykolaiv and Yuzhnoukrainsk, as well as a protest action directly at Gard.

On 6 June 2006 pickets were resumed of the Cabinet of Ministers premises, involving civic and Cossack organizations and political parties (the Ukrainian People's Party, the Green Party, the civic party PORA, the Ukrainian Conservative Party). The picket was aimed at drawing the attention of the Cabinet of Ministers to the destruction of a historical area on the State Register of Immovable Monuments. A letter was passed to Prime Minister Y. Yekhanurov, together with a copy of the Act from the Ministry of Culture's check of the state of the regional landscape park.

Then on 23 June the members of the civic campaign held a protest march with pickets of the Cabinet of Ministers, the Ministry of Justice and the Ministry of Fuel and Energy, protesting at the violations of Ukrainian legislation in the process of construction of the Tashlyk HAPS. The Prime Minister was called upon to put an end to the unlawful work in constructing the plant and to protect «Granite-Steppe Pobuzhya» as an invaluable part of Ukraine's natural environment and cultural heritage.

On 30 June the focus of the picket was the President's Secretariat, with the President being called on to intervene in the situation which had arisen as a result of the adoption by the Cabinet of Ministers of Resolution № 841, and to use his power to revoke acts passed by the Cabinet of Ministers, in accordance with Item 16 of Article 106 of the Constitution.

On 6 July 2006 EPL [«Environment – People – Law»] filed a civil suit to have the decision of the Mykolaiv Regional Council of 17.03.2006 declared illegal.

EPL had two court victories in January 2007 over this case. On 29 January 2007, the Lviv Regional Economic Court allowed its claim against the Prosecutor General. ELP had complained that the Prosecutor General had not properly considered EPL's complaint against the Resolution of the Cabinet of Ministers which had allowed Energoatom to receive some of the land from the regional landscape park «Granite-Steppe Pobuzhya».

The Court found that the Prosecutor General's lack of action on this claim had been unlawful and ordered that a proper check of the legality of the Cabinet of Ministers' Resolution be carried out.

On 26 July 2006 civic activists A. Halkin and O. Malytsky had filed a civil suit with the Central District Court in Mykolaiv calling for the decision of the Mykolaiv Regional Court of 6 June 2006 (removing 27.7 hectares from the regional landscape park and passing it to Energoatom – translator) to be declared invalid.. Energoatom had, on their part, made efforts to influence their opponents also through the courts. For example, at the end of 2005 they filed a suit against O. Malytsky over the publication of an article on the South Ukraine Nuclear Power Plant and the Tashlyk HAPS. Energoatom demanded 100 thousand UAH in compensation for moral damages.

A number of court hearings were held over the suit filed by A. Halkin and O. Malytsky, with one of them involving a visit to the Tashlyk HAPS and examining the building documentation. The claimants were represented in court by EPL lawyer O. Melen and expert consultant from the Mykolaiv branch of NECU, O. Derkhach.

On 22 January 2007 the Central District Court in Mykolaiv allowed the claim. It found that the decision of the Mykolaiv Regional Court No. 10 from 6 June 2006 to remove 27.7 hectares from the regional landscape park «Granite-Steppe Pobuzhya» in order for Energoatom to use it as the tail part of the Alexandrovsky Reservoir serving the Tashlyk HAPS to have been unlawful and therefore revoked the decision.

An appeal against this ruling is presently being heard in the Mykolaiv Regional Court of Appeal.

On 16-17 October 2006 an environmental fact-finding tour took place to the regional landscape park «Granite-Steppe Pobuzhya» and the construction site of the Tashlyk THAPS. It was organized by NECU and the Chortkiv (Ternopil region) branch of Zeleny Svit, and also included representatives from MAMA-86, «Pechenihi» (a Kharkiv group) and Ecoclub from Rivne, as well as a group of journalists from various Kyiv media outlets. .

The tour was aimed at ascertaining the real consequences of the flooding of the reserve lands, the attitude of the local population, the public authorities and bodies of local self-government, as well as the point of view of the administration and construction staff of the Tashlyk HAPS.

The group looked over Alexandrovsky Dam and the lower part of the reservoir, as well as visiting the Domanivsky district where agricultural land was flooded as a result of the first raising of the water level. On 28 July 2006 a session of the Domanivsky District Council specially addressed the issue of the environmental situation in the district in connection with the end of construction of the launching complex of the Tashlyk HAPS. The environmental situation was described as critical, and it was decided to approach the Cabinet of Ministers and Energoatom seeking compensation for losses incurred by the district's enterprises and to have budget subsidies designated for the development of the social infrastructure.

At the present time, the construction of the Tashlyk HAPS is continuing. Work by AtomEnergobud is near completion on accepting the station for exploitation. This work is considering options which have not undergone expert assessment. The first hydroelectric unit of the station is still not running, despite the pompous ceremony «launching the Tashlyk HAPS» which was attended by Prime Minister V. Yanukovych and shown to viewers of all national television channels. The level of flooding of the Alexandrovsky Reservoir is being unlawfully held at 15 metres.

Proposals: In the situation which has emerged, we need to fundamentally review the entire complex of problems linked with threats to natural and cultural heritage in building the Tashlyk HAPS and ensuring the rights of the public in this process. The following steps must be taken.

1. Suspend introduction of the Tashlyk project in its present form and review the options for changing its profile and for new technical decisions;

2. Immediately formalize State Acts for the permanent use of the regional landscape park «Granite-Steppe Pobuzhya» and accelerate the decision-making process over creating on its base a national nature park (in accordance with the Law from 21.09.2000 № 1989-III «On approving a National Programme for forming Ukraine's environmental network for 2000-2015»);

3. Ensure unconditional implementation of the proposals provided by the Ministry for Environmental Protection on establishing the regime for the water system for the river basin of the Southern Bug in order to return the situation to a legal footing as soon as possible. This includes urgent

reduction in the water level of the Alexandrovsky Reservoir to 10 metres, bearing in mind the need to gradually reduce the level established in accordance with legal decisions. Draw up a regime for gradually reducing this level to 8 metres;

4. Implementation of the Instruction on identified infringements of environmental legislation from the State environmental impact inspection of the Ministry for Environmental Protection from 16-19 May 2006 and provision to the Ministry of all material pertaining to scientific and expert assessments;

5. Carry out a new independent scientific study of the situation and a technical project for the construction of the Tashlyk HAPS within the context of the work of the whole South Ukraine energy network, envisaging in the future development of alternative options, for example closed cooling ponds or forms of dry cooling for the nuclear power plant, as well as considering conceptually new technical decisions;

6. Ensure observance of the public right to participate in decision −making on the construction of the Tashlyk HAPS in accordance with the Aarhus Convention.

3.3. FURTHER CONSTRUCTION ON THE DNIESTER HYDRO ACCUMULATING POWER STATION

The plans for the Dniester energy complex were developed in the 1970s and include hydroelectric stations HES-1 and HES-2, nuclear power plants and the Dniester Hydro Accumulating Power Station (the Dniester HAPS). The construction of the latter began in 1988, however due to the lack of State funding and investors, it soon stopped and was only restarted in 2000. The construction is mainly being carried out at with money from the Special Fund of the State Budget which is created out of the target-based administrative surcharge on the market tariff of electricity and established by decision of the Cabinet of Ministers.

According to information from the Ministry of Fuel and Energy, the general construction is 67% complete. In the opinion of civic organizations, for example, NECU, who in 2005-2006 investigated the actual construction, the level of completion is considerably lower. This is generally confirmed by Ukraine's Accounting Chamber which reports that as of 1 June 2006 1.72 million UAH of capital investments, this being 33% of the overall cost of the work on construction of just the first phase had been used.

The efforts of the Government to attract nongovernmental investment to accelerate construction of the Dniester HAPS have not yet been successful. At the present time no strategic investor has been found. In November 2005 the Ministry of Fuel and Energy approached the World Bank asking it to support the project for the Dniester HAPS through a loan of $200-250 million (in all, to complete work on the first hydro-aggregate around $500 is needed). The Bank proposed submitting an application and project documents by the end of 2006. As of May 2007, there were no reports on the official World Bank website about the results of the review of an application, nor about any conclusions from the Bank regarding the Dniester HAPS project and the prospect for the participation by nongovernmental organizations in the decision-making process. As a result, it is the State Budget which is bearing the main burden for financing the project.

It was from November 2005 that the authorities began intensively pushing through decisions concerning the Dniester HAPS. A considerable part of these decisions, both in content and procedure, violate Ukraine's international commitments, as well as norms of domestic legislation, for example, on access to information and public participation in decision-making on environmental matters.

The international political and legal aspect of the project: **The construction of the Dniester HAPS is being carried out on the transboundary Dniester River. Certain technological parts of the Dniester energy complex (the HES-2 Dam, a part of the constructions of the Dniester HAPS) are on sites which remain a subject of territorial dispute between Ukraine and Moldova. The State border has yet to be demarcated**.

It is this transboundary aspect which in the political and legal sense distinguishes the Dniester HAPS project from construction projects for the other Ukrainian hydro-accumulating power stations − Tashlyk and Kaniv. Yet some government authorities in Ukraine constantly deny the considerable transboundary influence of the construction and potential functioning of the Dniester

HAPS on the hydrological regime and state of the Dniester ecosystem, which the Moldovan side and some civic environmental organizations dispute. The Ukrainian authorities sometimes say that there was a review and agreement with the project by the Moldovan Government. However there has been no success in obtaining official documents on this, or at least specific references to them.

In response to an information request from Zeleny Svit regarding the completion of the construction of the Dniester HAPS (first phase involving three aggregates), the Ministry for Environmental Protection in a letter from 16.12.2005 № 14-12 also stated that «The project of the Dniester Hydro Accumulating Power Station was agreed by the bodies of local self-government and State administrations of the regions where the construction is taking place, as well as by the State Committee for Water Management, the State Geological Committee, the Ministry of Health and the Council of Ministers of Moldova».

In response to information requests from Moldovan civic organizations, the Moldovan Government denies any such agreement. In the final analysis there is no official confirmation that Ukraine ever informed government authorities in Moldova about the planned activities. The process of informing the public about the construction of the Dniester HAPS in Moldova is also not being carried out in proper fashion. It is clear that there have been no officially recognized public hearings on the subject in Moldova and the public has not been properly involved in the decision-making process.

Yet the environmental and legal problems caused by the building of the Dniester HAPS have in 2006-2007 been giving rise to ever greater concern among the public, scientists and some parliamentarians in Moldova. Members of the Moldovan Academy of Sciences and nongovernmental organizations point to an inadequate level of implementation by the parties of their international obligations with respect to the Dniester complex hydraulic unit and the construction project for the Dniester HAPS, starting from the stage of providing material giving technical and economic justification for the project and an assessment of the environmental impact (EIA).

One can site as an example the release on 5 March 2007 of an «Open letter to the President, Parliament and Cabinet of Ministers of the Republic of Moldova, as well as to the missions of international organizations, from scientists and representatives of nongovernmental organizations in Moldova concerned by the environmental problems of the Dniester River». The letter was signed by a group of current Members of the Moldovan Academy of Sciences, scientific research workers, representatives of ministries, government departments and nongovernmental organizations.

In connection with this, on 20 March 2007 the Moldovan Parliamentary Commission on public governance, the environment and development of territories passed a separate «Division on the influence of the Dniester hydro-technical complex (Ukraine) on the environmental situation of the Dniester River». The parliamentarians called on their Cabinet of Ministers and Minister of Foreign Affairs and European Integration to:

- *Initiate the creation of a bilateral commission including scientists, representatives of civic society, as well as independent experts from the World Bank, the European Union, the USA and others. This commission should carry out a scientific assessment and suggest measures for optimizing the regime of exploitation of the Novodnistrovsk hydro-complex in keeping with the needs of the Middle and Lower Dniester ecosystems.*
- *Accelerate the drawing up of a bilateral agreement of cooperation between Moldova and Ukraine on protection and sustained development of the Dniester River Basin, basing this on the draft drawn up under the auspices of OSCE and the United National Economic Commission for Europe [UNECE];*
- *Initiate negotiations on broadening the mandate of the OSCE Mission in Moldova through including issues of environmental safety;*
- *Apply all diplomatic means to ensure that Ukraine honours its commitments under the Espo Convention and provides Moldova with material relating to the impact assessment of the Novodnistrovsk hydro-complex on the Middle and Lower Dniester.*

A group of Ukrainian and Moldovan environmental organizations who have begun public monitoring of the construction of the Dniester HAPS are guided by the awareness of the need to bring the work under this project into line with norms of international law and to take the environmental risks of the project into consideration during the decision-making process.

The options for applying international conventions and agreements

It is well-known that the foundation for a legal regime for transboundary waters is the principle of «reasonable and fair use», in accordance with which each country within international water flows is entitled within its own borders to the relevant part of the benefits from the use of water resources. This principle was first clearly articulated in the 1997 United Nations Convention on the Non-Navigational Uses of International Watercourses. However neither Ukraine, nor Moldova is a party to this Convention. Nor have practically any mechanisms from other international conventions on transboundary impact on the environment been activated.

At the present time the regime for the use and protection of boundary waters between Moldova and Ukraine is regulated by only two bilateral agreements: the Intergovernmental Agreement signed on 23.11.1994 in Kishinev (The Agreement between the Government of the Republic of Moldova and the Government of Ukraine on Joint Use and Protection of Transboundary Waters) and the Protocol on Cooperation on Environmental Matters between the Ministry for Environmental Protection of Ukraine and the State Department of the Republic of Moldova on Protection of the Environment and Natural Resources from 19.11.1993.

In general, looking at the 1994 Agreement on Transboundary Waters, you can conclude that although it does create a certain legal base for bilateral cooperation on using and protecting transboundary waters, the base is however not in line, either in form or content, with standards and criteria accepted in modern international practice.

Ukraine and Moldova are parties to a number of UNECE multilateral conventions whose provisions can be directly applied to issues involving protection of transboundary water resources, including the implementation of water management and energy projects on the Dniester. This applies in the first instance to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsink, 1992). The Convention binds the parties to it to take individual and joint measures to prevent or limit transboundary impact. One of the belated steps directed at implementing the Convention should be considered the preparation by the Ministry for Environmental Protection of a Concept for a «State Programme of environmental regeneration of the Dneister River Basin». In general, as mentioned in 1.3 of this section, work on implementing the Convention has not yet taken on a systematic and planned nature. One of the paths of development for a legal base on transboundary cooperation within the context of adhering to the commitments of the Helsinki Convention (Article 9) is drawing up and passing a special Dniester River Basin Agreement. Work on this is at present continuing.

The legal and procedural aspects involved with assessing the impact of work under the project on the environment of the neighbouring countries are also regulated by the international Espo Convention on Environmental Impact Assessment in a Transboundary Context. The Espo Convention was new in stressing the right of the public to information, in seeking sustainable development, as well as preventing or reducing transboundary impact on the natural environment and organizing international environmental monitoring. The Convention imposes obligations regarding environmental impact assessment at the planning stage. It also envisages measures and procedure on preventing, controlling and minimizing any, especially transboundary, harmful impact on the environment. The present scope of the Espo Convention covers 22 types of activity (set down in Appendix 1 to the Convention). These include: nuclear and thermal power stations; the building of motorways and railways; chemical installations; waste disposal installations; major installations; reservoirs, ports, canals, groundwater extraction activities and others. If the proposed activity set down in Appendix 1 could have considerable harmful impact, the party intending to carry it out must as soon as possible, but no later than when it informs its own public, inform other parties who may be affected. A party whose territory may be affected has the right to take part in the environmental impact assessment (EIA).

The Aarhus Convention has in its list of activities which must envisage public consultation in accordance with Article 6 of the Convention: «Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres». It should be noted here that the upper reservoir of the Hydro-Accumulating Power Station contains 32.7 million cubic metres, over an area of more than

2 square kilometres on a plateau 150 metres high, and that this territory has extremely difficult geological and seismic conditions. Without any possible doubt, therefore, the plans for construction of the Dniester HAPS meet the criteria of the Aarhus Convention, and its implementation should from the very earliest stages involve full-scale public participation in decision-making.

Breaches of domestic legislation

The basic laws «On protection of the natural environment» (Article 21) and «On environmental impact assessments» (Articles 10-11) guarantee public participation in decision-making on environmental matters. Cabinet of Ministers Resolution № 554 from 17.07.1995, passed in implementation of the Law «On environmental impact assessments» added to the list of particularly environmentally hazardous activities and objects the construction of hydro-energy and hydro-technical constructions. These are subject to mandatory State environmental impact studies.

We would note there that no State Environmental Impact Opinion has been made public regarding the other parts of the Dniester complex hydraulic unit,: the Dniester HES-1 dam and the HES-2 buffer dam, despite 24 years having passed. Te Chernivtsi Regional Department for the Environment and Natural Resources will neither confirm nor deny the existence of such an Opinion, understanding the level of their liability in the event that there is none. The environmental protection community has no information to date proving whether or not there has been such an Opinion.

The environmental impact assessment procedure for HES-1 and HES-2 as functioning hydro-energy structures has not yet begun. This is despite the fact that Article 7 of the Law «On environmental impact assessments» stipulates that environmental impact studies are mandatory for functioning structures and complexes which have a strong adverse impact on the state of the environment. Such impact is confirmed, for example, by letter from the State Department for Water Management № MB/9-166 from 23.03.05 (to a letter of the Cabinet of Ministers № 9883/1/1-05 from 11.03.2005), where it is stated: «regulation of the discharge has led to a change in the hydrological and temperature regime in the ecosystem of the Dniester below the dam of the Dniester HES which is adversely affecting the condition of the water meadow system in the lower part of the river. The situation is exacerbated by excessive manmade pressure in the Dniester basin over recent decades.»

The first environmental impact assessment of the Dniester HAPS was carried out in 1994 and in no way met the requirements of current Ukrainian legislation, including with regard to public participation. The signing by the Ministry for Environmental Protection of the State Environmental Impact Opinion № 10-3/2-3-877 from 05.11.97 was also carried out with infringements of legislation, including the requirement for public consultation which were simply not organized.

However in the material from the 1997 State Environmental Impact Opinion there are a number of serious reservations as to the environmental and technical safety aspect of the project. For example, in the descriptive part it is stated that «the walls of the basin of the Dniester HAPS have a small safety margin».

The project envisages the organization of monitoring studies of the hydro-geological conditions and state of the geological milieu in the area over which the Dniester HAPS can have impact. It is a requirement of the Law «On environmental impact assessments» that this be made public, and the lack of such a publication suggests that it has not been carried out.

The positive State Environmental Impact Opinion № 307 from 23.11.2005 on just one page was signed by the Deputy Minister for Environmental Protection A. Hrytsenko in an atmosphere of haste and secrecy. The only report suggesting that a new environmental impact assessment was being planned was the publication in the newspapers «Bukovyna» from 11.05. 2005 and Vinnychyna from 13.05.2005 of a «Statement on the environmental impact of activities», approved by the head of the boards of the joint stock companies Dniestrovska HAPS and Hydroproekt. However, in breach of the Law «On environmental impact assessments» the Ministry for Environmental Protection did not publish any notification itself on the preparation of a new expert study. This violates the fundamental principles of State environmental impact assessments which should be based on a balanced assessment of economic, environmental, medical and biological, and social interests, taking public opinion into consideration. Such assessments must be scientifically well-founded, independent and objective, comprehensive, provide options; it must seek to prevent adverse impact and be open.

No mention is made in the Opinion of previous comments on the project, especially with regard to its manmade or seismic danger. State Environmental Impact Opinion № 307 was prepared in a mere 20 days – from 3 to 23 November. This time was enough for official letters and the relevant material on the issue to be exchanged between the Speaker of the Verkhovna Rada, the Prime Minister, Ministry for Environmental Protection, National Deputies from Bukovyna, the Director of the Academy of Sciences Geochemical Institute, the Mayor of Novodnistrovsk and other public officials, with the main correspondence taking place between 16 and 23 November 2005. Half of Opinion № 307 is devoted to so-called «public hearings» which took place on 21 November 2005 in Novodnistrovsk, proper invitations to which were not issued to representatives of the regional public councils, members of national civic organizations, or to representatives of local environmental civic organizations whose activities cover the Dniester Basin area. The management of the Dniester HAPS submitted Information and documents on the «hearings» in a letter dated 23.11.2005, this being the day also that the positive State Environmental Impact Opinion was signed. Bearing in mind normal bureaucratic procedures, doubts must arise as to whether this could have been achieved without prior agreement between the parties involved.

On the basis of some facts known about the use of State funding in the construction of the Dniester HAPS, one may be speaking of infringements of the principles stipulated in Article 7 of the State Budget Code., specifically the principles of budgetary funding being used for designated purposes, as well as those of public accountability and transparency.

In 2006 the Accounting Chamber for the first time carried out an audit of the use of State funding allocated from 2003-2005 for the construction of the Dniester HAPS. The conclusions of the audit have not been widely publicized, however they were provided in letter No. 16-1272 from 12 July 2006 in response to an information request from Zeleny Svit. The Accounting Chamber points to «a lack of well-considered government policy from the Cabinet of Ministers with regard to introducing new capacities for the countries energy system, in particular the Dniester HAPS. As of 1 June 2006 1.72 million UAH of capital investments, this being 33% of the overall cost of the work on construction of just the first phase had been used. The efforts of the Government to attract nongovernmental investment to accelerate construction of the Dniester HAPS have not proved successful. At the present time no strategic investor has been found. As a result, it is the State Budget which is bearing the main burden for financing the project. During 2003-2005 295,336 thousand UAH from the State Budget's Special Fund were spent. Of this amount, 13,607 were not used for their designated purpose and 61,300 thousand UAH were used ineffectively. In 2006 207 million UAH from the Special Fund is scheduled to be spent on the construction.»

According to the Head of the Chernivtsi Regional Control and Audit Department, the last review of the financial activities of the Dniester HAPS found that the scopes of work of 14 subcontractors had been over-estimated by 321 thousand UAH.[8]

Violations of the public's rights

In 2005-2006, a group of Ukrainian and Moldovan environmental organizations joined forces to carry out public monitoring of the construction of the Dniester HAPS. They included the National Ecological Centre of Ukraine (NECU), the NECU Bukovyna branch «Krona» (Chernivtsi); MAMA-86-Odessa; the civic organization «Krai» (Berezhany); Zeleny Svit (Chortkiv), «Biotika» (Kishinev), the international environmental association Eco-Tiras, and others. The group is impelled by the need to ensure that the project is implemented in accordance with norms of international law and taking environmental risks into consideration in decision-making.

«Krona», for example, in 2005 sent detailed comments and proposals to the Chernivtsi Regional Administration regarding the construction of the Dniester HAPS and the procedure linked with it. During the year the Public Council attached to the Chernivtsi Regional Administration also repeatedly called for a proper environmental impact assessment of the entire Dniester complex hydraulic unit and to hold public hearings.

[8] Yury Chornei: «A tricky situation» – http://www.zerkalo-nedeli.com/nn/show/576/52032/.

As mentioned above an imitation of public hearings was held on 21 November 2005 in Novodnistrovsk (Chernivtsi) region. These were supposedly for public discussion of the construction of the Dniester HAPS, however not even the Public Council attached to the Chernivtsi Regional Department for the Environment and Natural Resources was invited, nor were invitations sent to civic organizations with direct involvement in the area. It remains unclear who organized these curious «public hearings», where information was placed about them, what conclusions were drawn and added to the environmental impact assessment and how the public can find out about them. The information and «documents of the hearings» were provided to the Ministry for Environmental Protection by the management of the Dniester HAPS itself in a letter from 23 November. The Resolution from these «hearings» states that «the community of the region (? – *Ed.*), the Novodnistrovsk city and village councils are concerned by the situation over the possible suspension of work on completing the construction of the Dniester HAPS. .From information received by the authorities with regard to the results of the scientific environmental study and assessment of the material of the project «Completion of the construction of the Dniester HAPS (first phase of construction involving three hydroelectric units) it has become known that, together with the positive opinions from the expert study of the project by official bodies, objections against the advisability of the construction of the Dniester HAPS have been expressed by some civic environmental organizations, in particular Zeleny Svit and the National Ecological Centre of Ukraine «Krona».

The Ministry for Environmental Protection acceded to a situation whereby the right to participate in the «public hearings» on the Dniester HAPS project had essentially been monopolized by groups of its builders and residents of the city of Novodnistrovsk. It closed its eyes to the hundred-percent failure of the «hearings» procedure to comply with the norms of its own Regulations on public participation and hastily, on the very same day 23 November, approved the new State Environmental Impact Opinion concerning the Dniester HAPS project which removed 17 major reservations from the previous Opinion in 1997.

In view of this Zeleny Svit wrote to the Minister P. Ihnatenko on 16 December 2005 describing the Instruction of the Ministry to approve the State Environmental Impact Opinion concerning the Dniester HAPS as in violation of Articles 5, 6, 7 and 8 of the Aarhus Convention, as well as Articles 3, 6, 10 and 11 of the Law «On environmental impact assessments» regarding the environmental rights of members of the public, as well as the fundamental principles of an environmental impact study, which include considering public opinion, proper scientific backing for the Opinion and openness. Zeleny Svit also point out infringements in the procedure, set down in the same law, for carrying out an expert study both from the point of view of content and conclusions, It therefore stated that the Ministry had serious grounds for reviewing the content of the Opinion and sending the project for a new State Environmental Impact study.

The response received on 16 December contained no official material on the organization and running of the purported «public hearings». Instead it described the event as follows: «At a meeting attended by representatives of parties, civic organizations, city and settlement councils whose areas fall within the area of impact of the propose work, the staff of the Dniester HAPS, as well as representatives of the Chernivtsi Regional Department for the Environment and Natural Resources. Particular issues regarding the functioning of the existing hydro-accumulating stations and analogous structures in economically highly-developed countries, their impact on the environment, the history of decisions to design and build the Dniester HAPS were discussed, as well as a number of questions regarding the actual state of affairs at the present time. Representatives of the public at the meeting unanimously supported the need for completing the construction in order to resolve a number of social, economic and environmental issues, and a resolution to this effect was passed.»

The National Ecological Centre of Ukraine and members of the Dniester Basin Working Group of the All-Ukrainian Association of Civic Environmental Organizations «Ukrainian River Network» received analogous letters from the Minister in response to their letters.

During 2005 and the first half of 2006, environmental groups repeatedly approached the relevant authorities asking whether State Environmental Impact studies had been carried out on the other parts of the Dniester complex hydraulic unit in Ukraine – HES-1 and HES-2. Only on 20 June 2006 did the Ministry for Environmental Protection confirm that there had been no such studies.

The issue of the construction of the Dniester HAPS has been considered at three sessions of the Ministry for Environmental Protection Public Council (in December 2005, January and February 2006). Following the last meeting, on16 February the Public Council sent a letter to the Minister P. Ihnatenko demanding that Opinion 307 be recalled as having been prepared in a non-transparent fashion, and further procedure for agreeing the project for the construction of the Dniester HAPS, in particular calling for new public hearings to be organized. However no substantive answer to this letter was received. The Public Council's request that the Environmental Impact Assessment be made public was also not heeded. Neither the Ministry of Fuel and Energy, nor the Ministry for Environmental Protection, not the join stock company Ukrhidroenergo, nor the Chernivtsi Regional Department for the Environment and Natural Resources have found themselves able over the last year to make public the material from the Environmental Impact Assessment of the project and material from additional studies. It was possible to receive this material only directly from the office of the Dniester HAPS, and this was only thanks to the understanding and cooperation of the heads of the Department, and not public officials taking decisions on this environmentally hazardous project which could have adverse transboundary effects.

On 3 August 2006, i.e. 8 months after the positive State Environmental Impact Opinion was signed, the civic organization «Ukrainian Society for Sustainable Development» sent an email informing members of the Ministry for Environmental Protection Public Council and some civic organizations working in the Dniester River basin that on the instruction of the joint stock company Ukrhidroenergo on 2 September 2006 they would be holding new public hearings on the construction of the Dniester HAPS in Novodnistrovsk. Civic organizations received no official information about these hearings.

Given that the issues involved with the construction of the Dniester HAPS do not only concern energy industry and construction workers at the station and residents of Novodnistrovsk, but also those living on the entire Dniester basin, this being the Vinnytsa, Chernivtsi, Odessa, and Ternopil regions of Ukraine and Moldova, and in view of the fact that material needs to be read before the hearings, on 15 August Zeleny Svit (Chortkiv) sent official letters to the organizer of the Ukrainian Society for Sustainable Development, the Ministry for Environmental Protection and the Ministry of Fuel and Energy suggesting that more information be provided on the subject of the hearings, that the time and place be changed (Kyiv, Odessa and Chernivsi were suggested, and not during the period of summer vacations, and that the procedure for preparing such hearings be brought into line with the procedural norms of the Law «On environmental impact assessments» and the Ministry for Environmental Protection Provisions on public participation. Similar requests were made by the National Ecological Centre of Ukraine. However the organizers of this latest farce masquerading as «public hearings» simply ignored the suggestions put by the civic organizations. A decision was therefore taken to not take part in the hearings in Novodnistrovsk, but to send their own observers.

These observers again found many irregularities in the procedure for organizing and holding the «hearings». The organizers, for example, ignored the appeal from the Ministry for Environmental Protection Public Council sent to the organizing committee.

It has still not proved possible to get to see the relevant resolution from these «hearings». At one stage the Ministry for Environmental Protection posted a press release on its official website, where it stated that 350 people had taken part in the Novodnistrovsk «hearings». In fact, a copy of the registration list, received through official channels, shows that there were 230 people registered, with only 7 representatives of civic organizations, one of them from a Moldovan organization. 112 people were from the management and staff of various parts of the energy complex. The procedure and makeup therefore of the «public hearings» rendered the event so entirely predictable and unanimous, that there was no attempt even to formulate the extremely vague plans approved into any kind of resolution.

It is frustrating that the Ministry for Environmental Protection once again acquiesced to numerous normative and procedural irregularities. The specially empowered government body on the environment and natural resources which is responsible for holding State environmental impact studies should, of its own initiative, ensure public participation in the process of running such hearings, as stipulated in Article 11 of the Law «On environmental impact assessments». Nor were

written comments, proposals and recommendations from civic organizations considered in any way, and the inclusion of representatives of the public on expert commissions was not envisaged.

In this sense, we feel that there can be only one conclusion, this being that the Ministry for Environmental Protection in preparing the Opinions from State environmental impact studies regarding the project for completing construction of the Dniester HAPS did not allow for the participation of civic organizations in the process of holding expert environmental impact studies, and through this, infringed the Law «On environmental impact assessments».

In this sense, at least surprising is the fact that the «public hearings» in Novodnistrovsk», as an element of public participation, were organized under the leadership and on the instructions of the joint stock company Ukrhidroenergo which is not a party involved in such environmental assessments.

In its response on 1 September 2006 № 7345-к-08-11 to a letter from Zeleny Svit on 15 August, the First Deputy Minister S. Kurulenko confirmed that the Deputy Head of the department on State environmental impact studies would be taking part, and also asserted that written invitations had been sent by the organizers to a considerable number of civic and other organizations, the latter being deliberate disinformation.

For this reason, on 14 September the Ministry for Environmental Protection Public Council addressed a letter to the Minister for Environmental Protection expressing concern over the procedure for decision-making on issues involving the construction of the Dniester HAPS, public consultations and State environmental impact, these being, as the letter clearly articulated, in violation of both the Aarhus Convention and domestic legislation. Unfortunately the Ministry failed to respond appropriately to the Public Council's statement.

At the end of 2006, public actions concentrated on possible World Bank support for the construction of the Dniester HAPS. On 15 December civic activists held a protest action against any financing of the project outside the World Bank's representation in Ukraine. The organizers of the protest argued that the energy industry in Ukraine did not need this project, that financing by the World Bank would only increase Ukraine's foreign debt. It stressed also that the Dniester HAPS posed manmade, environmental and social dangers. The protesters handed representatives of the World Bank an NECU report which evaluates the risks of the Dniester HAPS project.

In April 2007, at the initiative of NECU, a group of 13 nongovernmental organizations in Ukraine sent another appeal to the World Bank Mission for Ukraine, Moldova and Belarus regarding the Dniester HAPS project.

The letter proposes:

♦ The World Bank should make efforts to help the Ukrainian government to develop an energy strategy which is much more effective, as well as support projects that are aiming to increase energy efficiency and the independence of the Ukrainian economy;

♦ The World Bank should withdraw its financial consideration until the project is brought into compliance with Ukrainian and international legislation;

♦ The World Bank should conduct its own assessment of the project's compliance with relevant international and Ukrainian legislation and publicly disclose its findings;

♦ The World Bank should organise public meetings with relevant stakeholders to discuss the ongoing schedule of preparatory work and areas of concern, on account of the project sponsor's ignorance of public opinion during the project preparation thus far.»

In May 2007 the Ukrainian River Network ran an information and awareness raising tour through populated areas along the Dniester River. Participants noted that the people they met were very ill-informed about the environmental state of the Dniester and about the specific features of the Dniester complex hydraulic unit.

In the course of the tour, recommendations were drawn up and submitted to the local authorities and bodies of local self-government on improving the socio-environmental situation in the region, the situation with drinking water, possible future action from the local authorities, etc.

The objective of environmental civic groups working in the Dniester River Basin is to ensure that Ukrainian legislation is properly adhered to. Each individual has the right to information, to a safe environment and decent living conditions. It is these rights that the authorities as well as those involved in the energy industry must accept and observe.

3.4. HUMAN RIGHTS AND THE ZAPORIZHYA NUCLEAR POWER PLANT

The Zaporizhya Nuclear Power Plant [Zaporizhya NPP] was built in a densely-populated region without any public consultation and against the will of the local population. Ignoring protests from the public and appeals from bodies of local self-government, the Zaporizhya NPP was the first in the CIS in 2001 to begin building the world's largest dry storage facility for used nuclear fuel. The stories of how first the Zaporizhya NPP and then the dry storage facility were created provide glaring examples of flagrant disregard for the environmental rights of the local population, specifically of their right to information and to participate in decision-making on the development of safe nuclear technologies in a densely-populated and industrial area of Ukraine.

The population of the area where the Zaporizhya NPP is located was kept out of decision-making process on strategic environmentally important issues involving the construction of a nuclear power plant and a facility for storing used fuel. The largest nuclear power station in Europe was built at a distance of 8 kilometres (with a norm of no less than 25 kilometres) from the city of Nikopol with a population of 150 thousand in a zone which had been flooded from the Dnipro reservoir above it. This is in contravention of IAEA requirements which stipulate that there should not be more than 4 reactors of a nuclear power station on one area in order to ensure radiation safety. The Zaporizhya NPP has long been the second station in the world, after Chernobyl, in terms of the amount of low-level and middle-level radioactive waste products. There are already 49 dry storage containers, each of which containing around 455 kilograms of deadly spent nuclear fuel. This as a whole is around 220 million Curie and is thousands of times greater than the radioactivity released from the nuclear bombs dropped on Hiroshima and Nagasaki.

Having realized following the tragedy of Chernobyl the dangers and high risk involved in living near a huge nuclear complex, the population of Nikopol, together with residents of other cities and settlements in the controlled zone began their struggle for the right to an environment which is safe for life and health, as enshrined in Article 50 of the Ukrainian Constitution.

From 1988 in Nikopol and other populated area where the Zaporizhya NPP is located held dozens of anti-nuclear rallies and pickets, including a picket of the Verkhovna Rada and Cabinet of Ministers against the construction of fifth and sixth reactors and then of the dry storage facility.

Nuclear industry representatives constantly claim that dry storage facilities have radiation no higher than that of the natural radiation background. However even after the first container was loaded in 2001, the readings for radiation tripled. In June 2004 the officially released level of gamma rays at the border of the industry square of the storage facility were several times higher than the natural number of gamma rays.

To this day the Programme for comprehensive environmental monitoring passed back in 1990 has not been implemented. Nuclear industry staff themselves acknowledge that the lack of information not only makes it impossible to gain full information about the state of the environment in the area around the Zaporizhya NPP, but also prevents the possibility of registering unfavourable changes.

Systematic infringements of the environmental rights of the population of the controlled 30-kilometre Zaporizhya NPP zone continued, while the staff went on building the world's biggest dry storage facility for spent nuclear fuel. The population of the city remained ill-informed about events at the plant. There are not enough Geiger-counter tableaux with this leading periodically to rumours and panic concerning supposed incidents at the station

The city's residents are not provided with information on what to do if there is an accident involving release of radiation at the Zaporizhya NPP, and about supplies of potassium iodide. Despite this, in 2007 the Zaporizhya NPP is planning to extend the dry storage facility and complete work on the construction of the second phase, intended for 280 containers. At the same time, Energoatom is studying the possibility of building several more nuclear reactors within the framework of the recently adopted Energy Strategy.

For this reason, on 26 April 2007, on the twenty first anniversary of the Chernobyl Disaster a rally was held in Nikopol, under the banner «Nikopol against new Chernobyls». The participants of the anti-nuclear protest organized by «Public Watch» stated that despite the will of the population of the controlled zone expressed in a local referendum in 1994, the nuclear power plant was

continuing to build he world's biggest dry storage facility for spent nuclear fuel 12 kilometres from Nikopol and to dump water contaminated with radionuclides from the power plant's cooling tank into the Dnipro River.

At the same time, the largest nuclear power plant in Europe is incapable of ensuring fundamental measures to protect the population in the case of a nuclear accident. Despite repeated appeals, training courses on what to do in an accident are not being carried out for residents of the city, nor are they provided with up-to-date leaflets on what to do (the last time such leaflets were published was in 1988, still in Soviet times). And most importantly, they are not provided with potassium iodide, a sufficient number of Geiger counter tableaux, and means of personal protection. Promises and formal fob-offs do not lead to a real change in the situation and reflect cynicism and disregard for the fate of the local population.

A Resolution passed at the rally demanded protection of the public's constitutional right to an environment safe for life and health, and demanded a ban on any construction or exploitation of nuclear installations without the consent of the population of the controlled zone of the Zaporizhya NPP. It called for a transparent State comprehensive sanitary environmental expert study of the environment of the controlled zone, and for the results to be made available to the public. It also demanded a moratorium on further exploitation and development of storage facilities for spent nuclear fuel.

The Nikopol City Council meeting on 27 April supported the protesters' demands and adopted in their turn an appeal, encompassing these demands, to the President, Prime Minister, Energoatom and the State Department for nuclear regulation.

CONCLUSIONS AND RECOMMENDATIONS

The above indicates that the situation with observing environmental rights in Ukraine is far from satisfactory. One sees a constant narrowing of options and the creation of obstacles towards access to information, participation in decision-making and access to justice on environmental matters. With the political events around the parliamentary and local elections, the formation of a ruling coalition and division of posts, the issues of environmental protection became ever less prioritized.

Ukraine thus shows signs of lacking a systematic State information policy of environmental matters.

SPECIFIC RECOMMENDATIONS

♦ Draw up and pass a number of amendments and additions to the Laws «On information», «On protection of the natural environment», «On the Fundamentals of health care legislation in Ukraine», «On safeguarding the sanitary and epidemiological wellbeing of the population», «On the use of nuclear energy and radiation safety», «On environmental impact assessments». These amendments should ensure compliance with basic standards on information about the state of the environment as set out in the Aarhus Convention;

♦ Introduce a system on legal education on issues pertaining to the Aarhus Convention for public officials, as well as representatives of other concerned parties who take part in the process of information sharing, as well as decision-making on environmental matters

Summing up the sections here on environmental rights, one must note that efficient legal remedies for protecting people's environmental rights and government environmental policy have yet to be properly set in place. Amendments to current legislation and subordinate acts have still not been developed enough to comply with the standards of the Aarhus Convention and help ensure its implementation. One is unable to talk therefore of full participation by the public in decision-making on environmental matters.

This is probably explained by the general level of maturity of the government and the public, the weakness of the Ministry for Environmental Protection and the inefficiency and corruption among the law enforcement agencies. Unfortunately, the issues of protection of the environment and of people's environmental rights cannot be named a priority area for Ukraine's political sphere, the authorities or for the mass media.

XIX. THE RIGHTS OF THE CHILD: SOME ISSUES[1]

INTRODUCTION

The rights of the child are a category of human rights however children also need particular protection from the State as foreseen in both international documents and Ukraine's legislation.

In briefly outlining the problem areas pertaining to observance of children's rights in Ukraine where changes and solutions are needed, we would first of all note the declarative nature of Ukrainian legislation and the lack of a systematic approach to creating effective procedures for protecting the rights of the child.

Reports prepared by government officials supposedly on the rights of the child usually in fact present qualitative or quantitative indicators regarding charitable actions and the amount of social assistance. This problem was noted by the UN Committee on the Rights of the Child in its recommendations on Ukraine's Second Periodic Report: «The Committee remains concerned, however, that the State youth policy covers social assistance, health care, education, alternative care and child protection and that it lacks a rights-based approach and does not encompass all rights enshrined in the Convention»[2]. Nor is the President's Decree «On priority measures for the protection of the rights of the child»[3]. any exception to this. There were no significant moves with respect to protecting children's rights in 2006 which the President had declared the Year of the Rights of the Child. We would simply note the ratification in 2006 of a number of international agreements relating to the rights of the child.[4]. Some of these had been signed back in 2002-2003 and had long awaited ratification.

While proclaiming social guarantees for children, the government by no means always carries out basic tasks on ensuring minimum standards regarding children's rights. For example, there are well-documented cases of infringements of procedural norms (mainly due to their shortcomings) on the questioning of minors by law enforcement officers[5], incidents involving violence or ill-treatment of children in educational institutions[6], children being illegally drawn into participating in political rallies and demonstrations[7] and so forth.

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[1] Prepared by Serhiy Burov, Civic Organization M'ART [«Molodizna Alternatva» – «Youth Alternative»] (Chernihiv) and member of the UHHRU Board; Partners (organizations or individuals) who provided consultation and/or information included: Olena Volochai («For Professional assistance»); Olena Hrabovska («Resonance»); Mariya Yasenovska («Civic Initiative»); Volodymyr Yavorsky (Ukrainian Helsinki Human Rights Union); Dmytro Groisman (Vinnytsa Human Rights Group); Larissa Baida (Children's Cultural-Educational Centre), Yevheniya Pavlova (Foundation for the Protection of the Rights of the Child); Yury Lutsenko , (Foundation for the Protection of the Rights of the Child); Ruslana Burova and Oleksy Kinebas (M'ART)

[2] Consideration of reports submitted by States parties under article 44 of the Convention, CRC/C/15/Add.191 9 October 2002, D.12

[3] Presidential Decree «On priority measures for the protection of the rights of the child», 11 July 2005 № 1086/2005.

[4] These were: the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and the Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations from 1973 (*translator*).

[5] According to a study carried out by M'ART in 2006.

[6] According to information published in the section on children's rights of the UHHRU website http://www.helsinki.org.ua/index.php?r=1&t=14

[7] see.: http://www.osvita.org.ua/news/27272.html; http://khpg.org/index.php?id=1176229402; http://www.umoloda.kiev.ua/number/893/113/32524/; http://khpg.org/index.php?id=1176277739

The section on the rights of the child in *Human Rights in Ukraine – 2005*[8] concentrated on compliance of domestic legislation and practical implementation of this with general international standards. Attention was paid to only some of the problem areas linked with observance of children's rights in 2005.

This focus was not by chance since at the time the report was being written there was no even remotely serious government report or other document regarding observance of children's rights on which to base a civic assessment, and to agree or disagree, using information available to human rights organizations.

Unfortunately the situation remains the same now. Despite having declared this the year of the protection of children's rights, 2006 brought no particularly positive moves on this front. Nor did the relevant authorities carry out monitoring and assessment at government level of the situation with children's right and of progress as far as developing government strategy for ensuring observance of children's rights in Ukraine.

We are therefore forced to again focus on certain most urgent issues and are unable to provide an assessment of positive actions taken by the government given the lack of a developed government strategy on safeguarding the rights of the child.

THE RIGHT TO LIFE

Official figures from government bodies indicate a high level of child mortality. According to the President, «*Ukraine continues to have a relatively high level of child mortality (11.5% of the overall number of deaths)*». The President was speaking at a meeting on protection of the rights of the child[9], on 13 March 2007. He believes that the solution to this problem lies first of all in health care. The Ministry for the Family, Youth and Sport also acknowledges «.*a high level of infant and child mortality up to the age of 5 as compared with developed countries*».

Problems in the area of health care remain as acute as ever, and are not confined to certain areas or groups in society. These are problems at government level, linked with the failure to provide for the normal functioning of medical institutions, with the low level of accessible domestic medical supplies, in the lack of awareness among medical staff about human rights standards at least as regards fulfilling their own professional duties, etc. In 2004 M'ART [«Youth Alternative»] carried out monitoring in children's medical establishments and children's psychiatric hospitals. The main findings and recommendations from that study remain relevant today.

A CHILD'S RIGHT TO PRESERVE HIS OR HER IDENTITY

Present norms in legislation ensure that a child is registered at birth. Article 144 of the Family Code stipulates that it is the duty of parents to register the child at a State register office within one month of birth.

A child receives citizenship at birth. There is no problem with an adopted child's citizenship since the Law «On Ukrainian citizenship» names adoption as one of the grounds for being granted citizenship.

There is a problem in Ukraine with safeguarding the right to preserve ones identity in the case of adoption.

The norms of the Family Code on confidentiality of adoption run counter to Articles 7 and 8 of the UN Convention on the Rights of the Child. For example, Article 7 guarantees the child «as far as possible, the right to know and be cared for by his or her parents» and Article 8 envisages that «States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference».

[8] see.: http://www.helsinki.org.ua/index.php?id=1150957520
[9] see: http://ww8.president.gov.ua/news/data/print/14193.html

In cases of adoption, the first and last names of a child may be changed even if the child already knows his or her name, as can records about place and date of birth. This not only restricts a child's right to preserve his or her identity, but also limits his or her right to contact with both parents and blood relatives (brothers, sisters, or grandparents).

There are no legal provisions in Ukrainian legislation guaranteeing adopted children the retention and later provision of information about their biological family; their real date and place of birth. In fact, disclosure of the fact of adoption is a criminal offence..

FREEDOM FROM HUMILIATING TREATMENT AND PUNISHMENT

In the section on children's rights in *Human Rights in Ukraine – 2005,* we devoted considerable attention to the question of freedom from humiliating behaviour and punishment.[10] We pointed to the fact that normative acts existed but that their enforcement left a lot to be desired.

According to official figures from the Prosecutor General,: «.*During 2005-2006 the courts recognized 9 thousand children (under 18) to be victims of crime. Services dealing with minors had almost 45 thousand unfavourable families with 94 thousand children on their precautionary register. However the register in police departments only had 2.5 thousand names of domestic violence offenders. As a result of brutal treatment from their parents, children have been forced to leave home, roam, beg and commit offences. In 2006 alone juveniles committed 10.5 thousand offences. 12 thousand children who had been on the street and begging were brought to juvenile shelters*».[11]

Prosecutor's checks have established infringements of the Law «On prevention of violence in the family» by Internal Affairs agencies, offices for care and supervision, education and services dealing with minors. According to information from the Prosecutor General, the responsible government bodies are breaking the Laws «On social work with children and young people», «On education»!, «On general secondary education», «On the police», and «On agencies and services dealing with minors and special institutions for minors». Attention is drawn to the fact that in the vast majority of regions the bodies responsible «*have not drawn up programmes of prevention of violence in the family; have not established their regions' requirements with regard to specialized institutions for victims of violence; do not look into the reasons and conditions contributing to such negative forms of behaviour. Cooperation between these bodies is confined to sharing statistical information*»[12]. *The Prosecutor General states that: «Police departments sometimes refuse to register appeals regarding violence in the family or institute criminal proceedings over cases where crimes have been committed against the life and health of minors. For example, the district inspector of the Oleksandriysky Police Station in the Kirovohrad region refused to launch criminal proceedings over a statement regarding torment and beating of underage S. Stryzhak by his father and cohabitant.*[13]

The same information confirms that over recent times there has been an increase in cases of ill-treatment and sexual abuse of children by some officers of the criminal police on juvenile affairs. *«The Zaporizhya Regional Prosecutor launched criminal proceedings in April this year over the unlawful detention and rape by personnel of the criminal police on juvenile affairs of the Orikhivsky District Police Station of minor D. Zatsarny. The investigation is continuing. Staff of the Zavodsky District Police Station in the Dnipropetrovsk region used beatings and torture during the night to minor V. Halko detained on suspicion of theft. The teenager was hung up to the wall and they beat his head with a bottle inflicting physical pain and bodily injuries. The Prosecutor of the Dnipropetrovsk region on 19.06.2006 launched criminal proceedings over this under Article 365 § 2 of the Criminal Code»*[14].

Analyzing the information provided by the Prosecutor General, including the excerpts given above, one should note that regrettably there is no analysis of the legislation itself and indication of

[10] See.: http://www.helsinki.org.ua/index.php?id=1150957520
[11] Information on adherence to legislation aimed at protecting the rights of minors who are suffering from criminal encroachments, violence in the family, being drawn into committing a crime and other unlawful activities // Letter from the Prosecutor General to the Prime Minister from 31.07.2006. N 07/3-90
[12] Ibid.
[13] Ibid.
[14] Ibid

its shortcomings. A deeper analysis of the situation which is partially presented in the information from the Prosecutor General indicates the inadequacies, and sometimes also the absurdity of the government system aimed at ensuring and protecting the rights of the child. The Prosecutor General records his work with the following figures: «*prosecutor's offices instituted over 1 thousand criminal proceedings; 2.5 thousand documents of prosecutor's response were registered, with the results of their examination being administrative proceedings instituted against nearly 2 thousand officials to protect the rights of minors as well as over 2 thousand civil suits*». However these figures do not provide grounds for a qualitative assessment of the work of government bodies aimed at safeguarding the rights of the child. The judicial system needs an appropriate specialization. The office of the Human Rights Ombudsperson is virtually not involved in the system of children's rights protection.

It should be mentioned that in combating the problem of violence against children, the Ministry for the Family, Children and Youth has proved quite open to cooperating with civic organizations. It works both with civic organizations and international agencies active in protecting the rights of the child. However awareness-raising or information measures remain isolated events and these are usually initiated by civic organizations. A proper system is lacking for carrying out regular educational and training work among professional groups working with children or in their interest, parents or those replacing them.

According to figures from the Prosecutor General[15], during 2005-2006 courts declared over 8 thousand minors victims of crimes. Yet amendments have still not been introduced to the Criminal Procedure Code [CPC] to ensure that a child witness speaks with those carrying out the investigation only in a safe environment and with a psychologist present. The present version of Article 168 of the CPC only sets out the compulsory presence of an educational worker, and then only for children under 14. Young people from 14 – 16 receive such assistance at the discretion of the investigator, while for those between 16 and 18 nothing is allowed for at all. According to the legislators, the presence of a doctor, parents or other legal representatives is to be provided only where needed, yet no even approximate criteria are provided for how this need is to be determined.

With regard to procedure for bringing charges and questioning a juvenile accused of a crime, this only stipulates the mandatory presence of a lawyer, while the involvement of others such as, for example, a psychologist, educational worker or the parents is possible only for those under the age of 16 or those officially recognized as mentally retarded, at the application of the lawyer. In practice also, where there are problems with providing a lawyer, the accused is questioned as a witness.

Minors' direct participation in court hearings remains an issue since the Criminal Procedure Code does not envisage the possibility of their testimony given during the pre-trial investigation being taped and later used in court to avoid children having to appear themselves in court and repeat their evidence in the fraught atmosphere of a court examination, the latter having an adverse effect both on the child's mental state and on the quality of his or her testimony.

With regard to the questioning of an underage victim, Article 171 of the CPC (Summons and questioning of a victim) does not stipulate any particular guarantees at all for minors since it establishes virtually the same procedure as for the questioning of a victim, referring to Articles 166 (Procedure for summoning a witness for questioning) and 167 (Questioning a witness), saying nothing about the need to adhere to even those safeguards for underage persons envisaged by Article 168 (Questioning of an underage victim) of the Criminal Procedure Code.

These conclusions are not only the result of analysis of legislation. There have been cases, identified through monitoring and from people's approaches, which demonstrate problems not merely in legislation, but in its practical implementation.

As an example we can cite the case of a 13-year-old boy which prompted an appeal to the public reception centre of one of the organizations in the Ukrainian Helsinki Human Rights Union. The young lad was questioned by police officers the day after a shop was broken into in a neighbouring village. The police officers breached the law in beginning to question the lad still in the school courtyard, one to one, effectively holding an interrogation with disregard for legally established procedure. During the

[15] Information about implementation of legislation aimed at protecting the rights of minors who have suffered as the result of crimes, violence in the family, being drawn into criminal or other unlawful activities // Letter from the Prosecutor General of Ukraine to the Prime Minister from 31.07.2006. N 07/3-90

questioning later in the presence of a teacher, the lad was informed that he was suspected of having burgled the shop. However the questioning took place as that of a witness, whereas a person accused of a crime must be questioned with a lawyer present. Another breach of the CPC in particular was the fact that no protocol was drawn up as a result of the questioning. It is interesting that the grounds for the questioning were that the law enforcement officers had found the name of the lad in a list of unfavourable families. The list was in the school and the police officers had taken it from the Deputy Head. They also took the boy's fingerprints. The 13-year-old was asked to sign the sheet with the fingerprints.

Pursuant to Article 11 § 11 of the Law «On the police», police officers have the right to take fingerprints, however only in respect of «...persons detained on suspicion of having committed a crime, for vagrancy, remanded in custody, charged with a crime...»[16]. Yet the lad was even questioned according to procedure for questioning a witness.

The lack of special rehabilitation and care programmes for victims of violence, as well as those accused of violent offences, remains a problem.

In 2005 Ukraine signed the European Convention № 116 from 24 November 2003 on the Compensation of Victims of Violent Crimes. A government programme for child victims was created, however the Convention has not yet been ratified and the programme accordingly is not working.

Resolution of conflict and methods of upbringing in educational institutions will begin complying with children's rights standards only on condition that a system is developed for training educational workers on both human rights in general, and on the rights of the child. There is at present no such system in either training colleges or in professional development institutes for educational workers. We would note that it is specifically a system for training personnel which is needed, this including developing a strategy and first training specialists to run such courses, as well as drawing up methodological material, and so forth.

2006 broke all records in terms of the number of reports in the mass media about cases of ill-treatment in educational institutions. The cases involved both brutal treatment by other school students, and by personnel of the institutions. This reflects the irresponsible attitude to their duties of education system structures in Ukraine. Ad hoc actions which, for example, the Minister of Education and Science spoke about at a press conference[17] in Uzhhorod on 23 November 2006 are not creating a system to ensure the safety of school students while in an educational institution.

The issue of «status» punishments (those where minors can be punished for acts which an adult would not be held legally liable for and would not therefore face punishment for), which were mentioned in the recommendations to our report in 2005, had not previously been addressed in Ukraine and the area requires further study. However there are at least cases testifying to such «status» treatment to those under age in, for example, preventive upbringing and in combating child homelessness. In this context the conclusions drawn by the International Society for Human Rights – Ukrainian Section are of interest.[18]. The Society considers that the procedure for Internal Affairs structures regarding children who have for one reason or another left home needs to be changed. For example, pursuant to Article 5 of the Law «On agencies and services dealing with minors and special institutions for minors» from 24 January 1995, the criminal police on juvenile affairs are obliged to **return** to their place of permanent residence, studies or send to special institutions for minors within eight days of **locating** a minor who has been abandoned, or has wandered off or left his or her family or school/children's home». The Society believes: «an abandoned infant or small child, who has wandered off must be located by the law enforcement authorities and placed in the appropriate children's institution. It is another matter when we are dealing with young people between 12 and 16 who have deliberately, and possibly on many occasions left their family or school -institution, or who have been living outside social institutions for a fairly long time. These children need special study and psychological and educational influence». Each individual cases needs to

[16] Article 11 § 11 of the Law «On the police»
[17] See.: http://helsinki.org.ua/index.php?id=1164377252
[18] Benjamin Babadzhanin, Projects Manager for the International Society for Human Rights – Ukrainian Section, excerpts from the report.

be studied, with the procedure being specific, based on the physical and psychological make up of the child and the level to which they are able to make their own decisions. However at present this procedure seems more like punishment.

In *Human Rights in Ukraine – 2005»* (the section on the rights of the child), we spoke of the tendency to send children from school – orphanages to psychiatric hospitals. In 2006 we observed additional cases confirming the existence of the problem, but also certain steps in response by government bodies.

For example, on 8 February 2007 Sevastopol's Prosecutor Volodymyr Dereza informed that in 2006 around 60 orphans from children's homes and school-orphanages[19] had for a month been held illegally in the city psychiatric hospital[20]. The Prosecutor stated that a criminal investigation had been launched into this. He said that it could be supposed that particular children did require such medical care, however expressed surprise that in the psychiatric hospital they had formally treated the young patients and stressed: «The doctors were obliged to immediately return those children who didn't need in-patient care».

This case is thus yet another confirmation of what we warned of last year. The point here is that in the majority of cases these children need psychological assistance. Most school-orphanages are themselves unable to provide full psychological assistance, and send children for treatment to psychiatric hospitals. However as we stressed earlier, even in the best cases (if the educational staff do not make such actions a form of punishment, the doctors do not make any diagnosis), the child perceives this as punishment and experiences serious psychological trauma.

Another form of ill-treatment is the use of the worst forms of child labour which is prohibited under Article 32 of the UN Convention on the Rights of the Child. Figures on this are provided by the Foundation «Protection of the Rights of the Child» in their report.[21]. This states, for example, that «...the study carried out by the State Committee of Statistics in cooperation with the ILO in 1999 and 2000 found 456 thousand children working. Of these, 87 thousand were children from the most vulnerable group, aged from 7 to 12. However the real figures may be higher than these official statistics since the methodology used involving selective statistic examinations only makes it possible to identify labour activity of those children living in families with parents or guardians. It is highly likely that children living in asocial families, those living by begging, living in school-orphanages, or children of illegal migrants were not included in the study»

Among the worst forms of child labour seen, the Organization names child prostitution, begging, children being drawn into criminal activities (stealing, drug pushing, etc), collecting glass and scrap metal, work at markets, with this normally involving loading work.

With regard to sexual exploitation and the sexual corruption of children, figures from government institutions and nongovernmental organizations are widely divergent. For example, the criminal police on juvenile affairs during the first six months of 2006 documented 8 crimes under Article 155 of the Criminal Code (sexual relations with a person under the age of sexual maturity) and 28 under Article 156 of the Criminal Code (corruption of a minor). The results of studies carried out by nongovernmental organizations suggest a much wider scale of the problem. For example, a 2005 survey undertaken by the Ukrainian Women's Consortium of specialists of school-orphanages showed that 34% of the specialists had come upon at least one cases of sexual coercion involving a child. In fact the problem is not typical only for closed children's institutions, but also for general education schools. According to figures from the International Women's Human Rights Centre La Strada – Ukraine, every seventh adolescent suffers from sexual abuse by adults[22].

[19] These rather odd combinations are being used to distinguish between different forms of institutional care in Ukraine. The distinction is basically in age, with school – orphanages being for school-age children and young people. In Article 5 of the Law cited immediately above, children being returned to their place of studies would be in institutional care (*translator*)

[20] See.: http://helsinki.org.ua/index.php?id=1170947747

[21] «Comprehensive monitoring of the children's rights situation in Ukraine». The All-Ukrainian Foundation «Protection of Children's Rights», Kyiv, 2006

[22] See.: http://www.helsinki.org.ua/index.php?id=1116944491

THE RIGHT TO RESPECT FOR ONES PRIVATE AND PERSONAL LIFE

The private life of children in educational, medical or other institutions needs to be protected. The personnel of such institutions should show respect for the personal life of the children, with this being especially important where children are living in dormitory conditions.

This issue has thus far not received any attention from the government. Clearly, as with many other, this is not an issue for Ukraine alone. There is however no government programme which includes efforts to improve the situation as far as this right is concerned.

Ensuring a compulsory level of basis knowledge on the rights of the child for each specialist working with children would already be an important move towards improving the situation. This should be part of the both training programmes and professional development courses for those professional groups working with children and in children's interest.

It is disturbing that outside individuals are able to receive information of a private nature via school documentation. Usually the school journals which can be read by students, parents and other teachers have a health page which contains medical diagnoses on students.

An individual approach to studies undoubtedly takes into consideration the state of health of each student, however there should be another way of keeping private information in school documents which can be accessed by other people.

THE RIGHT TO INFORMATION AND TO KNOW ONES RIGHTS

The description in *Human Right s in Ukraine* – 2005 of the situation with access to information in educational and healthcare institutions regarding review of the issue of care and court proceedings remains current to this day.

The main features of public human rights education remain as they were outlined a year ago. The government declares that a system of legal education has been created in Ukraine from the first to the eleventh grade, for example in information to the list of questions from the UN Committee against Torture to Ukraine's Fifth Periodic Report on its implementation of the Convention against Torture.[23]. Firstly, however, human rights education is not entirely equivalent to legal education, and secondly the shortcomings in the content of the curriculum for the subject «The (Fundamentals of) Law» in the ninth grade have for some time now raised doubts. There are also certain aspects linked with the lack of a clear system of human rights education. Most importantly, if its introduction becomes mandatory, special training will be needed of teachers in order to teach the relevant subjects and prepare the necessary textbooks, and this takes time.

It is for this reason that in our recommendations we do not propose introducing compulsory subjects, but suggest creating the opportunity to prepare and choose alternative textbooks on civic education, human rights and the rights of the child – courses which could be envisaged as a variable part of the curriculum. The best opportunities also need to be created for choosing courses from the variable part since the school curriculum is so overloaded that there is usually no possibility of such choice. Bearing these recommendations in mind and with the active involvement of civic organizations in developing programmes, preparation of textbooks and specialists, as well as regular monitoring of this process, it would be possible to create a truly democratic model for human rights education in Ukraine.

The programmes for training and professional development of professional groups working with children or in their interest do not envisage compulsory basic knowledge about children's rights.

According to Article 9 of the Law «On the protection of childhood», the government shall promote «the publication and dissemination of children's literature and textbooks by creating concessionary conditions for their publication.»

[23] CAT/C/UKR/Q/5/Rev.1/Add.1, 24 April 2007..

The situation in educational institutions is such that only around a third of students are assured textbooks. According to official data from the Central Control and Audit Department of Ukraine[24], the average percentage of textbooks reaching educational institutions is 67% of the number required. Some of these arrive in numbers which mean that one textbook needs to be shared by 3 or 4 school students. It is also typical for textbooks or the main consignment of them to reach the school library in the middle of the academic year, i.e. when the course has long been running and students have already had to buy the textbooks themselves. The most interesting thing in this sense is the fact that one can freely buy textbooks which state that they are not on free sale. As an example of this one can mention the textbook «The Foundations of Law» for the ninth grade edited by Zhuravsky[25]. On page 2 which has the details about the publication, after the phrase about the textbook being recommended by the Ministry of Education and Science, there is a note: «Issued with State funds. Sale prohibited». Yet the textbook seems quite at home on the shelves of bookshops. This all makes it possible to draw the following conclusions: firstly, there is clearly a situation with possible corrupt actions at various levels; secondly, such a situation demonstrates the lack of action by the controlling authorities who are generally more concerned with checking educational institutions than with directing their efforts at searching for the direct causes of the problem; thirdly; the overall pictures creates the impression that the «concessionary conditions» for publishing and disseminating textbooks declared by the government at legislative level do in fact exist, however not in the interests of the children, but to serve the corrupt interests of certain public officials.

Yet again this demonstrates the problem of the government's failure to implement the provisions of Article 42 of the UN Convention on the Rights of the Child which binds States Parties to «undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike». In *Human Right s in Ukraine* – 2005 we also cite the relevant norm of the Council of Europe Recommendations № 1286.

The problems with these provisions not being enforced are not only linked with the abovementioned level of human rights education, but also with the disregard for Ukraine's obligation to make widely available Ukraine's periodic reports to the UN Committee on the Rights of the Child and the Committee's recommendations in response. We are only aware of the Second Periodic Report in 2002 having been made public, however this was not made widely available. Yet according to Article 44.6: «States Parties shall make their reports widely available to the public in their own countries». The Recommendations of the UN Committee on the Rights of the Child on Ukraine's Periodic Reports are generally hard to find, and it is usually an unofficial translation that is in use[26]. This is despite direct recommendations from the UN Committee on the Rights of the Child[27]: «In light of article 44, paragraph 6, of the Convention, the Committee recommends that the second periodic report and the written replies submitted by the State party be made widely available to the public at large and that the publication of the report be considered, along with the relevant summary records and concluding observations adopted by the Committee. Such a document should be widely distributed in order to generate debate and awareness of the Convention and its implementation and monitoring within all levels of administration of the State party and the general public, including concerned non-governmental organizations».

[24] http://www.dkrs.gov.ua/kru/control/uk/publish/article?art_id=38495&cat_id=32243

[25] «The Foundations of Law». Textbook for the nine grade of general schools / General Editor V.S. Zhuravsky // Academic Editor M.I. Melnyk, M.I. Khavronyuk – K. Yurydychna dumka, 2004 – 424 pages.

[26] At the end of 2004 a book was published: «Concluding comments and recommendations from the Convention bodies of the UN on Ukraine's human rights reports», under the general editorship of the Human Rights Ombudsperson. This covered such comments and recommendations fro the period from 1991 – 2004. On the inside cover it is stated that the official translation of the concluding comments and recommendations was done by the Legislation Institute of the Verkhovna Rada. This assertion would seem doubtful since official texts must be published in the legally stipulated publications (*Editor*)

[27] Consideration of reports submitted by States parties under article 44 of the Convention CRC/C/15/Add. 191, 2002. Section 10 Item 77

THE RIGHT TO EDUCATION

All of the problems highlighted, and the recommendations given in the section on children's rights in *Human Right s in Ukraine* – 2005 remain current.

The results of a study carried out by a group of civic organizations in 2006[28] again drew attention to the large number of children not attending school. Within the framework of the study surveys were carried out and statistical data gathered. «The number of children who systematically or constantly do not attend school is an indicator of the failure to enforce Article 28 § 1.d of the UN Convention on the Rights of the Child. The figures are particularly high in the Kharkiv region where 65.8% of those surveyed said that they knew children who do not attend a kindergarten or school. In the North 33.5% gave this response, in the South – 27,8%. In the West, according to statistical data from the beginning of 2006, out of 86,492 children of preschool age, 59,492 for various reasons do not go to a preschool, while of 206,394 children of school age the number is only 11. This correlates with the results of the survey among the public. In the Volyn region 52% of the respondents said that they knew children who do not attend a preschool centre or school; 60% in the Chernivtsi region; and 76% in the Transcarpathian region. To compare the provision of the right of a child to be in a preschool centre or school even within the limits of one overall region it is worth noting that only 24% of those surveyed in the Ternopil region spoke of knowing of children who were not attending an educational institution.

According to the results of the survey: access to education is an issue for the public, especially in agricultural regions since as a rule on their territory there are mainly profile educational institutions for providing the region with the relevant specialists. We would add that the restricted access to preschool education in rural areas still remains.

There were no notable moves towards achieving equal access to education for children with mental health disorders. In Ukraine there are children who are entirely or partially deprived of access to education. This is confirmed by data from the National Assembly of People with Disabilities in Ukraine[29]: *«...At the present time in Ukraine there are a large number of children who don't receive any education at all. This especially applies to children with mental health or learning disorders, as well as those children who are looked after by the State in children's homes or school-orphanages within the social protection system, which do not carry out educational activities or do not have the relevant specialists or teachers.*

Education is also not envisaged for children with medium or severe learning disability. Even the standard for education is developed only up to the level of elementary school and only for children with light learning disabilities. Within the framework of implementation of the State standard for elementary general education for children with special needs curricula were issued for preparatory and first grades according to a new content and structure. At the present time the curricula for grades 2 – 4 have only been sent to the publishers. In 2006 only textbooks and course manuals for children with disabilities (92 titles) were added to the list of educational material for general schools and technical-vocational colleges.

Nor are children with hearing or sight impairments able to fully exercise their right to education since there are not enough textbooks and special literature printed, for example, in Braille, nor are there the technical means for helping children with sensory disorders receive a full education and learn to lead a free and autonomous life.

The issue is therefore how to provide students with disabilities with textbooks and other learning material. At the present time there are no exact figures about the level to which the need for domestic textbooks is being met in school-orphanages where 54.1 thousand children with disabilities study. The tuition is in Ukrainian, although most of the textbooks which date back to Soviet times are in Russian.

A particular place in the barrage of problems children, especially those with neuromuscular disorders, face, is occupied by the sheer difficulty of getting to educational institutions. Nor is the problem

[28] «Comprehensive monitoring of the children's rights situation in Ukraine». The All-Ukrainian Foundation «Protection of Children's Rights», Kyiv, 2006

[29] «On the rights of disabled children in Ukraine». The national assembly of people with disabilities in Ukraine».

confined to education, but is the same with health care, housing and transport, sports and cultural premises, which leads to them being effectively isolated from society.

If the issue of ensuring the right of each child to an education is raised both by governmental agencies, and by civic organizations, the question of disabled children's general development, including in the areas of culture and sport, and that of their recreational activities, is exclusively up to the family or individual civic organizations. The experience of some civic organizations shows that children with disabilities are able to take part in drama and dance clubs or sports centres. They can take part in competitions and find self-fulfilment in art or music. Children who have the opportunity to develop beyond the family circle and educational institutions are seen to have a reduced sense of inadequacy, psychological discomfort, and they later find it much easier to integrate into society. There is thus a need to direct the government system of supplementary (extra-curricular) education towards work with disabled children.»

It is important to note that the problem of social integration of children with special needs, for example, of equal access to education and the opportunity to attend general educational institutions, requires a clearly defined action plan. We need to train the appropriate specialists, develop and create the necessary material base, adapt educational premises for people with special needs, as well as learning programmes, and to prepare absolutely all members of the educational process for the changes to come.

The government is continuing to ignore the problem of organizing education in hospitals, etc.

FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Greatest concern last year was aroused by the approach of government bodies to the introduction in school programmes of lessons on Christian ethics. This applies especially to the report that «...the President has instructed the Minister of Education and Science Stanislav Nikolayenko to monitor the introduction of the course «Christian Ethics» in all schools of the country...»[30].

The school in Ukraine is separate from the State. This principle is enshrined in Article 35 of the Constitution. There is nothing wrong with aiming to develop spiritual values in schools, however the manner in which this is done much be chosen with respect for religious freedom. A specific religion or the system of values of a particular religion should not be a school subject.

THE RIGHT TO FREELY EXPRESS ONES OWN VIEWS AND TO BE LISTENED TO DURING ANY COURT OR ADMINISTRATIVE EXAMINATION AFFECTING THE CHILD (IN HIS OR HER OWN AFFAIRS)

On the basis of a study[31] carried out in 2006, the «Protection of Children's Rights» Foundation believes that «...the traditional attitude to children in society also quite often restricts respect for their views in the family, school and community. Children's opinions are still given inadequate consideration when it comes to a number of legal and administrative decisions. This includes, for example, the most common situations – in determining who the child will live with if the parents divorce, adopting a religion or making a decision about an adoptive family, being in a children's home or specialized school-orphanages. Innovations with involving children in the discussion of certain issues in their life at roundtables during parliamentary hearings and other measures somehow reflect a certain formality, the mere appearance of listening to children's views, while generally they don't find the necessary attention and implementation.»

[30] See.:http://www.kievpress.info/read/27983.html. (in Ukrainian). In this report there is more information on this subject in the section on freedom of conscience and religion.

[31] «Comprehensive monitoring of the children's rights situation in Ukraine». The All-Ukrainian Foundation «Protection of Children's Rights», Kyiv, 2006.

PROPERTY RIGHTS

An area of particular concern is the protection of the property of children deprived of parental care. We therefore quote the following from the report by the Regional Charity «Resonance» entitled «Observance of the property rights of orphans in Ukraine».[32].

The Observance of the property rights of orphan and children deprived of parental care is one of the most difficult issues of social protection for this group of children. It is therefore particularly important to have clarity and an unequivocal treatment of the current normative legal base regulating this area.

Our analysis of the law highlighted the following shortcomings:

1. According to the Family Code and the Law «On ensuring the organizational and legal conditions for the social protection of orphaned children and children deprived of parental care», the child retains the right of use to the accommodation in which he or she lived before being placed in a school-orphanage. That is, the child is entitled to the accommodation either on the basic of collective ownership, or as private owner. In addition, according to the Law «On protection of childhood» from 26 April 2001, the premises are retained in the children's name for the entire period during which they are in state care, regardless of whether the property where the children have come from is now lived in by other members of the family.. At the same time, the Housing Code states that living premises are retained for the children if there are other members of the family living in the house or flat (or part of such). There is thus a contradiction, since it is not set down whether there must be somebody from the family of the child living in the accommodation to ensure that the property is retained in the child's name.

2. According to the Civil Code a person from the age of 14 to 18 is considered to be a minor, while under the «Rules of care and guardianship» – from 15 to 18.

3. The current «Rules on care and supervision» are not in keeping with the real situation at the present time and quite often clash with other laws and subordinate legislation.

4. In the present Housing Code the first priority for providing housing to orphans is not set out, nor is there an effective mechanism for providing social accommodation to young people finishing school-orphanages. The mechanisms for control and protection of children's housing rights foreseen in the Housing Code are out of date and out of step with the contemporary structure of government organization and law in Ukraine. They are therefore ineffective and fail to work in practice. .

One of the main problems is the fact that many young people from school-orphanages do not have papers confirming their status as an orphan or child deprived of parental care. This is due to inadequate coordination of the actions of the authorities responsible for passing the child's documents to the orphanage, as well as objective difficulties of the orphanage's lawyer in communicating with each of them. Another problem is ensuring that the documents are organized in full and in timely fashion. Current legislation does not envisage liability for not organizing these documents properly which in turn can make it impossible for the child to take possession of his or her property which does in fact belong to them. Such situations most often arise as the result of incorrect recording of passport details – a mistake in the last name, or in parents' names.

A child's documents, passed to the school-orphanage, only set down the person who is responsible for keeping any property remaining after the death of the parents. Those responsible for maintaining any other property are not indicated. In Ukraine there are several levels of offices of care and supervision which causes difficulties when designating public officials responsible for keeping property held for children in institutional care. The law also does not provide a mechanism ensuring liability where an official does not fulfil his or her duties with regard to appointing a curator of the child's property.

The authorities do not take an active position as regards providing information about property belong to an orphan or child deprived of parental care. Information about such property in general emerges at the initiative of the children themselves. Efforts to inform the children about people who may be responsible for and manage the children's property are not adequate.

[32] «Observance of the property rights of orphans in Ukraine»: Report on monitoring carried out // compiled by O. Hrabovska, O. Kopanska – Lviv: TeRus, 2006 – 152 pages.

In school-orphanages there is no effective apportioning of guardian duties between members of the administration, the lawyer and social worker. In the vast majority of cases no use is made of legal mechanisms to defend the interests of the children in these institutions as a result of the responsible individuals being unprepared, or the lack of a lawyer.

The main problem in maintaining the property of orphans is payment of communal charges. This problem is not addressed by Ukrainian legislation and there are accordingly no mechanisms to regulate it. The property held for children in care is not let out. The main abuse in managing orphans' property is linked with keeping property that has not been privatized for the child.

In most school-orphanages all the students need to be provided with accommodation after graduating. According to the Law «On ensuring the organizational and legal conditions for the social protection of orphaned children and children deprived of parental care», these young people are placed on the flat register after they turn 18. The overwhelming majority of students of school-orphanages finish school before reaching that age. Since the problems with provision of social housing in Ukraine have yet to be resolved, and the question of provision of housing for young people finishing school-orphanages is raised not long before they are to leave the institution, they are effectively forced to either continue their studies or find a job where hostel accommodation is provided. However this does not solve the problem, but simply puts it on hold. At present there is also no procedure for returning a young person to the home that they once shared with their parents: the young person's right to accommodation is fixed on the formal basis of the parents' housing. This leads to the situation whereby a young person leaving the school-orphanage has accommodation fixed in his or her name, but no actual possibility of returning to it and living there. At the same time the very fact of this fixed accommodation deprives the young person leaving the school-orphanage of concessions for receiving accommodation without waiting in the queue. There have already been some reasonably successful attempts to introduce at government level mechanisms for providing social housing to young people finishing school-orphanages however there is still no mechanism for a systematic resolution of the problem. In cases where a child did not have accommodation and registration before entering the institution, it is impossible to determine which government body should deal with providing them with housing. There is no clear legislative answer to this problem.

At the present time there is no procedure for allocating temporary government assistance to young people leaving school-orphanages in cases where the parents are refusing to pay maintenance, or are not in a position to support the young person, as well as where the parents' whereabouts are not known. There is no mechanism for providing social assistance to those young people who are not entitled to a pension due to the loss of the breadwinner, yet who are on full State support. No money can thus be saved in these young people's personal accounts making the starting conditions when leaving institutional care unequal.

The main problem with observing the rights of these children in care to receive maintenance (from a parent) is not linked with the management of these funds, but with their formal organization. The lack of court claims for alimony leads to maintenance not being assigned by the courts. Enforcement of court rulings to extract maintenance payments from parents of children in care is inadequate.

The norm requiring proof that parents had worked for 5 years when assigned a pension due to the loss of the breadwinner causes considerable difficulties for school-orphanages in collecting the relevant documents. This prevents certain categories of children from receiving such payments and consequently leads to social inequality. The amount of the pension due to the loss of the breadwinner is at the moment one of the most burning issues. The problem is exacerbated where the breadwinner was bringing up several children, since then one pension is divided between the number of children involved. The size of this pension is significantly lower than other social payments.

Moreover, it costs money to open a personal account which the Budget does not allocate funds for.

Shortcomings in the mechanism for receiving financial assistance on leaving the school-orphanage and a statistical register of orphans and children deprived of parental care leads to some young people not receiving the money at all, or very late. There is no problem with receiving clothes, shoes and similar, or money to purchase these when leaving, with this being allocated on

time. The amounts, however, differ radically between different regions. This is directly linked also with the lack of standardization of norms for a minimum level of payments in various normative legal acts. Both staff of the school-orphanages and young people finishing them pointed to the fact that the amounts of financial and material compensation do not match the real needs of the young people. We are therefore forced to conclude that current legislation and subordinate legislation are not regulating material assistance for orphans and children deprived of parental care when they come to leave institutional care.

Infringements of children's property rights, in particular, their right to housing, are to some extent the result of failings in legislation on care and supervision. Legislation does not oblige offices of care and supervision to monitor whether parents or those replacing them buy other housing to replace that expropriated and to ensure that the child's right to it is formalized. Nor is there regular public control over the work of school-orphanages.

Virtually all norms pertaining to control and responsibility with respect to fulfilment by guardians (carers) of their duty to protect children's property rights should be extended to cover legal entities acting as guardians or carers, i.e. the administration of school-orphanages, especially where the child has no other guardians. We can say that at the present time these institutions do not enforce the norm of «Rules of care and supervision» which requires guardians or carers to report to the offices of care and supervision about each child. The school-orphanages report on protection of the rights and interests of the children under their care differently, annually, as a response to a formal request for information or some other way. Yet statistical information, individual reports on each child are not provided. This is a significant shortcoming in the existing mechanisms for ensuring observance of children's property rights. .

Agreements over operations involving children's property require notarized confirmation after preliminary consent from offices of care and supervision. However the mechanism for such cooperation is inadequate and there have been cases where the offices unwarrantedly refuse to consent to expropriation of the property. On the other hand, if these bodies give consent for the expropriation of the child's property under certain conditions, the notaries are not obliged to ensure that these conditions are fulfilled since this is not envisaged by the «Instructions on the rules of procedure for carrying out notary tasks by Ukrainian notaries». In the sale of housing where a part of this belongs to a child in a school-orphanage, there are no indicators devised to determine whether the interests of the child are being best served (for example, when instead of a flat in a city, the child is bought a building in a village).

The most accessible way for children in care to protect their property rights is by approaching the school-orphanage's lawyer. There may be a number of reasons why there is no such person (such a post may not have been allowed for; the lack of prospects for growth and development in the case of young specialists), but this makes any protection of the children's rights much more difficult. It is reasonably common to approach the courts for this protection. This is to be praised yet it cannot be the solution to systemic problems.

GENERAL RECOMMENDATIONS

1) The authorities and other government agencies working in the interests of children should introduce a permanent mechanism for assessing observance of children's rights in the country. At least the Human Rights Ombudsperson and the Ministry for the Family, Youth and Sport should provide annual reports on the situation with the rights of the child. The response from public organizations and the mass media to these reports and their widespread public debate could create the basis for constructive democratic dialogue aimed at improving the situation. There is regrettably no such dialogue at present due to the lack both of political will from the relevant government bodies, and to the lack, generally, of overt failure to fulfil their duties.

2) All specialists working with children need to have basic knowledge in the area of children's rights. The system both of training and of professional development courses for professional groups working with children and in their interests should be based on this principle. For example, the staff

of children's hospitals, etc, should receive special training on legal standards when providing medical assistance and the specific aspects of working with child patients.

3) Ukrainian legislation needs to be brought into line with international standards with regard to ensuring the right of a child to protection of his or her own identify in the case of adoption. For example, the first and last names of a child may be changed, records on place and date of birth altered when a child is being adopted in the interests of the child involved, however the law must guarantee the opportunity to receive this information. The right of access to information, including to acts regarding civic state, does not in itself guarantee the possibility of finding biological parents, brothers and sisters. The individual details about a child may only be changed where there is a special need for this.

4) The practice of unlawfully placing children from children's homes or school-orphanages in psychiatric hospitals must be stopped immediately, and an effective mechanism must be developed to enable the law enforcement agencies to react in such cases.

5) In all cases involving minors, regardless of their procedural status (whether they are victims or the accused) a lawyer must take part since these people are not capable, due to their age, of independently defending their interests. As a result, young victims often lose the opportunity of receiving proper compensation for the material and moral damages sustained.

6) Besides the general principles of equal rights and prohibition of discrimination, there need to be special mechanisms envisaged by legislation on protection from discrimination, especially as regards particularly vulnerable groups of children. .

7) Action must be taken to make it impossible to misuse for corrupt ends the «concessionary conditions» for publishing and distributing textbooks and other material for educational institutions.

8) Existing government reports to the UN Committee on the Rights of the Child must be immediately made available (an official translation should be made and published in official publications).

9) Broaden and improve procedural opportunities for children to take part in decision making in cases concerning their interests. This especially applies to court proceedings and criminal investigations.

10) Normative acts regarding the prohibition of corporal (physical) punishment should be made to work, and need to be accompanied by broad-ranging awareness-raising and information measures, and training sessions among professional groups working with children or in their interests, their parents or those replacing them.

11) Changes are needed in procedure for criminal investigation and court proceedings. The child should communicate with those running the investigation via a psychologist in a safe environment. The conditions should minimize the degree to which the child takes direct part in court proceedings or the investigation. To achieve this, it is important to use audio and video recordings, a «Venetian mirror» during questioning to avoid having to repeat testimony many times.

12) Rehabilitation and treatment programs for victims of violence, as well as the offenders themselves, should be developed or improved, and implemented. Any suspended sentences passed down should be directly contingent upon the offender's participation in treatment.

13) The resolution of situations of conflict and methods of upbringing in educational institutions must comply with standards for observing the rights of the child.

14) «Status» punishments, that is, those where minors can be punished for acts which an adult would not be held legally liable for and would not therefore face punishment for, should not exist either at the level of legislatively imposed norms, or in the practice of preventive upbringing measures.

15) A system should be created of specialized courts (juvenile justice). This will help improve the practical efficacy of the procedure for protecting the rights of the child, as well as the liability for the non-observance of these rights by those with responsibility.

16) Documentation in educational institutions which is not about an individual must not contain information about the state of health or medical diagnoses of any individual.

17) Children able to understand their circumstances need to be guaranteed access to information concerning them in school, children's homes, at the doctor, or in the case of court proceedings.

18) More attention needs to be paid to teaching children about human rights and the rights of the child. Human rights education is an important component of civic education. Programs need

to be developed for children of different ages, textbooks should be written and there needs to be the possibility of choice.

19) The government should pay particular attention to ensuring access to.education for children with impaired possibilities, with the maximum level of socialization for these children within general schools, and should provide individual tuition for those children needing it.

20) Children in hospitals and similar should have the opportunity to continue their education if their state of health allows.

21) Proper financing needs to be provided for educational institutions, with payment of salaries for educational staff and provision of the necessary materials in schools.

22) The public authorities should develop and introduce a separate program for children who have dropped out of school and do not wish to continue their studies.

RECOMMENDATIONS ON OBSERVING THE PROPERTY RIGHTS OF ORPHANED CHILDREN IN UKRAINE[33]

DOCUMENTARY CONFIRMATION OF STATUS OF AN ORPHAN OR CHILD DEPRIVED OF PARENTAL CARE

1) Introduce an effective mechanism of control and liability for inadequate or careless processing of documents of orphans and children deprived of parental care. In this context it would be advisable to analyze practice in other countries and introduce procedure for administrative liability of public officials.

2) To create order with property documents of each child and to increase their awareness about the property, we would suggest supporting the practice of registration cards for children in institutional care and allow for each child to be able to see their own such card.

HOUSING

3) Review current legislation on controlling the safekeeping of orphaned children's accommodation, increase the powers of the controlling bodies, create permanent commissions made up of deputies on exercising such control and establish and open list of named individuals responsible for keeping their property, and impose liability where this is not done appropriately. Resolve the problem of communal payments for the property while the children are in care.

4) Develop procedure for providing orphans with organized social accommodation, designate those responsible for assessing the accommodation conditions of children leaving care and create a database of children in school-orphanages indicating whether they need housing. This will also help the child while still in the institution to begin resolving the issue of accommodation and make it possible to exercise systematic control over the property of those children who have it.

5) Create a single register of housing which is owned by orphans and children deprived of parental care and which is not subject to expropriation or sale. Introduce effective mechanisms of control over the activities of notaries as regards operations with housing of children in school-orphanages.

6) Increase liability of public officials for failing to properly protect the property of children in school-orphanages.

7) Introduce amendments to legislation regarding the allocation of funds from local budgets to pay money owing on communal charges.

8) Supplement the Housing Code with articles enabling children to be placed on the register to receive a flat as first priority on the application of the school-orphanage, office of care and supervision, or a guardian, to allow for a mechanism to provide first priority loans to orphaned children via youth housing loans.

[33] «Observance of the property rights of orphans in Ukraine»: Report on monitoring carried out // compiled by O. Hrabovska, O. Kopanska – Lviv: TeRus, 2006 .

9) Introduce amendments to the Family Code to have courts designate those responsible for retaining housing and property of children in school-orphanages

10) Determine the procedure for placing children who did not have housing on being referred to an institution on the register for flats, and develop a mechanism for receiving housing from the local fund.

11) Improve the mechanism for letting accommodation of children in school-orphanages under the control of the authorities..

12) Introduce a mechanism for periodic assessment of the possibility of returning the child to the housing held in his or her name.

SPENDING

13) Establish a minimum pension due to the loss of the breadwinner, regardless of how long the parents had worked and the number of children in the family. Devise and implement a mechanism of social payments not only for orphans but for all children in school-orphanages.

14) Introduce amendments to the Family Code by adding provision on mandatory consideration by the court in the case of deprivation of parental rights of the question of maintenance and establishing a guardian for the property. The court should establish whether the child has property, appoint a guardian for the property, and address the issue of maintenance since in civil suits the claimants do not always mention maintenance for a child.

15) Implement via legislation a mechanism for saving in an orphan's own account a certain «amount not to be blown», a minimum cumulative variant of social security (for example, a deposit).

16) Begin a programme for the charge-free opening of savings accounts for children from school-orphanages in State-owned or private banking institutions, or introduce the practice of allocating funds for opening such accounts and clearly stipulate the source of the funding.

17) Agree an increase in the level of payments on leaving a school-orphanage and of pocket money (review this annually to bring the amounts into line with inflation.

18) Create a single nationwide register on receiving money and material assistance on leave school-orphanages. .

GENERAL SUGGESTIONS FOR IMPROVING THE RIGHTS SITUATION AS REGARDS ORPHANS BEING CARED FOR IN SCHOOL-ORPHANAGES

19) Create a single structure dealing with the problems of orphaned children and stipulate at legislative level one body of care and supervision. Clearly delineate the powers of bodies dealing with orphans, and also set out the proper control over their activities.

20) In our opinion, the norm as to reporting on observance of the rights and interests of each child should be extended to the administration of school-orphanages, although the procedure for submitting reports can be simplified in comparison with that for individuals (physical persons) acting as guardians or carers.

21) Create a single social service for the socialization of orphans and children deprived of parental care.

22) Introduce a system of social accompaniment for a child for a certain period after they leave the school-orphanage. Introduce a government awareness-raising programme within the framework of socialization of children from such institutions.

23) Intensify the process of introducing juvenile justice in Ukraine.

24) Actively involve the public in debating and seeking ways to resolve the problems linked with orphans and children deprived of parental care being in institutional care.

25) Accelerate the process of phased reform of school-orphanages in accordance with the Law «On ensuring the organizational and legal conditions for the social protection of orphaned children and children deprived of parental care».

XX. KEY HUMAN RIGHTS ISSUES IN CASES INVOLVING DOMESTIC VIOLENCE[1]

In this analysis of the human right to freedom from violence we will concentrate exclusively on issues of violence in the family. It is this definition which is provided in domestic legislation, some statistics are kept on this and programmes are undertaken by civic organizations and international institutions. This does not mean that other forms of violence are not widespread in Ukrainian society, however they are less immediate.

1. SCALE OF DOMESTIC VIOLENCE

Violence in the family is one of the ways in which the human and civic rights and legitimate interests of a person are violated. In 2001 the Verkhovna Rada passed the Laws «On prevention of violence in the family» and «On amendments to the Code of Administrative Offences to impose liability for acts of violence in the family or failure to obey a protection order.

The Law «On prevention of violence in the family» provides the following definition: «violence in the family – shall be understood to be any deliberate physical, sexual, psychological or economical actions aimed by one member of the family against another member, if these acts violate the constitutional human rights and civil liberties of the latter and inflict moral damages as well as harm to his or her physical and psychological condition».

Violence against women is an abuse of their basic human rights including their right to physical and mental integrity, their right to life and their right to equality with men.[2].

However violence in the family cannot simply be equated with gender violence or that against women. Any members of the family can be victims, including children, just as they can be the perpetrators. This means that one cannot simply consider domestic violence as a violation of women's rights.

The main sources of information about violence in the family are:

- Law enforcement agencies, mainly the police;
- Civic organizations working in the area of prevention of violence and combating it in the family, the information includes that received from help lines;
- Social services;
- Sociological and criminological studies;
- Reports from the mass media.

The Ministry of Internal Affairs (MIA) reports that they have 85,178 people on their register for acts of domestic violence, with 63,624 of these registered in 2006. 76,192 received official warnings; protection orders were applied against 6,359 people; 66,873 were fined; 375 sentenced to corrective work and administrative arrest was used against 9,334 individuals. The statistics are kept by the Ministry of Internal Affairs Department of Public Safety.

[1] By K.B. Levchenko, International Women's Human Rights Centre «La Strada – Ukraine».
[2] From Amnesty International's report: «Domestic Violence – Blaming the victim», available from the AI website at: http://web.amnesty.org/library/Index/ENGEUR500052006?open&of=ENG-UKR.

The State Social Service for Children, the Family and Youth keeps a database of crisis families. As of 1 January 2006 this contained approximately 133 thousand families[3].

Data from nongovernmental organizations also confirm the particularly acute nature of the problem regarding the scale of various forms of violence in Ukrainian families. For example, the National Help line on prevention of violence and protection of children's rights run by the La Strada – Ukraine Centre received 692 calls over 2005-2006.

The media do not give enough coverage of these important issues. Even in the so-called «women's» press, women's journals, these issues are not covered. In general information emerges during the action «16 days against violence» which is held each year at the end of November – beginning of December. Material on these issues has been printed by the journals «Zhinka» [«Woman»] and «Korespondent», the newspapers «Fakty», «Vechirny visti» [«Evening news»]. «Bez tsenzury» [«Without censorship»] and others.[4]

According to unofficial statistics, over 3 million children each year in Ukraine witness or are themselves victims of domestic violence. Most of them suffer serious psychological trauma, withdraw into themselves, and have suicidal thoughts as well as a low feeling of self-esteem.[5]

In order to study public opinion about violence in the family, La Strada – Ukraine carried out a nationwide survey. Most of those asked saw violence in the family as an immediate problem for Ukraine (81%) and the world as a whole (84%). At the same time only 8% said that it was an issue for their family, while 20% said that domestic violence was an issue in the families of their friends and people they knew.

With regard to the most widespread stereotypes that *«violence is mainly a problem in low-income families»* and that *«violence is a family matter and there's no need for intervention by competent bodies»*, respondents could be divided as follows: 53% believed that in families with a low income violence is more common, while 47% did not agree; 66% did not consider domestic violence to be the family's own business. These findings demonstrate that in Ukrainian society the old stereotypes about violence in the family are gradually crumbling.

Most of the respondents – 89% – are convinced that to solve the problem of domestic violence, one needs to work with the perpetrator. 62% felt that the perpetrator needed to be removed from the family into shelters and that there should be such shelters in each region and district (81%). 86 % consider that individuals who commit acts of violence in the family should face criminal liability.

85% believe that domestic violence is linked with alcohol. 87% therefore agreed with the statement that a person who had been violent while in a state of alcoholic intoxication should be forced to undergo treatment against alcoholic dependency. 85% do not consider compulsory treatment of perpetrators to be a violation of human rights.

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[3] The categories of families in difficult circumstances are based on a Joint Order of the Ministry for Family, Youth and Sport, the Ministry of Health, the Ministry of Education and Science, the Ministry of Employment and Social Policy, the Ministry of Transport and Communications, the Ministry of Internal Affairs and the State Department for the Execution of Sentences from 14.06.2006 № 1983/388/452/221/556/596/106 «On approving Rules of Procedure for people engaged in social work with families in difficult circumstances». The list is as follows:

- families with children who find themselves in difficult circumstances and are unable to resolve the problem themselves due to disability of parents or children; forced migration; the drug or alcohol dependence of a member of the family; a member of the family being imprisoned; HIV-infection; violence in the family; neglected children; children being orphaned; lack of respect and negative relations within the family; one of the members of the family being unemployed if s/he is registered with a State employment service as looking for a job;
- families where a question has been raised as to whether to place a child in a children's home for orphans and children deprived of parental care;
- underage solo mothers (fathers) who need support;
- families whose members have been or are on State support.

[4] The newspaper «Fakty»: «Once papa said: «You'll get bigger and I'll make a child of you, but if you're born from another man, I'll kill you», «I called the police: «Have you managed to get petrol yet? You'd better come, I've strangled my husband») (3.08.2006), «It's a fake and provocation. My daughter's lied about my young husband because she doesn't like him» (27.12.2006), «Wives cripple their Russian men» (21.03.06), the journal «Korespondent»: «In India they're made it illegal to rape women» (№ 43 (188), 26 October 2006), the newspaper « «Bez tsenzury»: «In bed with an enemy» that's how almost 68% of Ukrainian women feel» (25 October 2006 p.).

[5] «In bed with an enemy» that's how almost 68% of Ukrainian women feel», Natalka Poznyak-Khomenko, the newspaper «Bez tsenzury» (25 October 2006).

One form of violence in the family is that against children, including through the use of corporal punishment. The use of the latter violates a whole range of the rights of the children as enshrined in the UN Convention on the Rights of the Child and confirmed in the Ukrainian Constitution and Law «On the protection of childhood». These include the right to not be ill-treated; the right to life and physical integrity; the right to the highest standards of physical and mental health and others. Studies carried out have shown that Ukrainian society is quite tolerant of corporal punishment being used to children.

There is a dominant stereotype in Ukrainian society that violence, ill-treatment of children and neglect are problems exclusively of crisis families or those who are badly off or poor. The survey carried out of public opinion, which certainly needs further study, provides grounds for asserting the contrary. For example, among those who described their material position as «We can afford to buy virtually anything we want to», 22 % think that the use of corporal punishment is always expedient if the child is behaving badly, while another 50% said that they were prepared to use corporal punishment in certain cases. Only 28% of respondents from that group consider that corporal punishment is unacceptable in any circumstances. It is worth mentioning that the respondents in that group had most often been punished in this way as children. For example, 59% of those surveyed had expressed corporal punishment several times a month, while 41% said that it had been applied very seldom. However not one person said «never». The study also found that there was a great lack of knowledge regarding alternatives to smacks for bringing up and exerting influence on a child.

A major problem in society is presented by gender stereotypes, including those related to violent forms of behaviour and communication in society.

Often the main culprit is society itself, or more specifically, conservative morality which virtually legalizes the right of a man to dominate over a woman. It is society which looks with suspicion at unmarried women, solo mothers or those divorced, seeing them as some kind of second-class citizens. A woman is often forced to abandon the struggle for the right to be her own person by the banal arguments «what will people say?» or «so that at least it's not worse». In fact, however, practice shows that submission only further encourages domestic tyrants.[6].

Since violence is no longer regarded by international human rights standards as a private matter (thanks to the adoption of the UN Declaration on the Elimination of Violence against Women in 1993, documents from the Vienna World Conference on Human Rights (1993) and the Fourth World Conference on Women (1995 p.), countries must commit themselves to prevent and combat all forms of violence. This means that as well as legislation which imposes liability for violence, they must create a system both for preventing violence and for providing comprehensive assistance to its victims.

2. THE GOVERNMENT'S RESPONSIBILITY FOR ENSURING PROTECTION AGAINST VIOLENCE

As Amnesty International states in its report Ukraine legislation and executive authorities are failing to fulfil the country's obligations under international human rights law to exercise due diligence to secure women's rights to equality, life, liberty and security, and freedom from discrimination, torture and cruel, inhuman and degrading treatment.[7]

DEVELOPMENT OF A GOVERNMENT PROGRAMME OF SUPPORT FOR THE FAMILY

Work was carried out in 2006 on developing a government targeted programme for providing support to the family. These government targeted programmes are a way of implementing State governance in a specific area.

[6] Ibid

[7] From Amnesty International's report: «Domestic Violence – Blaming the victim», available from the AI website at: http://web.amnesty.org/library/Index/ENGEUR500052006?open&of=ENG-UKR..

The work was undertaken by the Ministry for Family, Youth and Sport, together with civic and international organizations. The draft programme had a section on countering violence in the family. This was a palliative decision since many civic organizations were insisting on drawing up and passing separate programmes for preventing and countering violence. However the wish of the government to reduce the number of such targeted programmes led to the inclusion of this block of issues in the programme of support for the family.

On 31 January 21 the Government targeted programme for providing support to the family was approved by Cabinet of Ministers Resolution. However, following its affirmation, the number and substantive content of the measures planned decreased substantially. This particularly concerned measures on preventing and countering violence in the family.

This situation is typical of other government programmes with a gender and social focus as well. For example, after the passing by the Cabinet of Ministers of a Programme for implementing gender equality (November 2006) and a Programme on combating human trafficking (7 March 2007), their content was significantly reduced. This state of affairs, on the one hand, decreases the responsibility of the government and its need to act, while on the other it deflects public criticism since it can formally report that it approved the programmes.

The situation has, moreover, developed in such a way that the right of the public and civic organizations to take part in drawing up government programmes has been violated through a secret revision behind closed doors of the jointly drafted documents. This means that the need has increased for vigilant control and attention to these issues from civic human rights organizations and the mass media.

With regard to drawing up legislative measures for preventing and combating violence, we should mention the draft Law «On a nationwide programme and National Action Plan for implementing the UN Convention on the Rights of the Child from 2006-2010, which was drawn up in 2005-2006 by the Department for the Protection of the Rights of the Child within the Ministry for Family, Youth and Sport together with civic and international organizations. This was passed in its first reading in February 2007. Preparation for its second reading is going slowly since again the interests of civic organizations who want to see as substantive a plan as possible are running up against the wish of executive authorities to reduce government responsibility for carrying out policy in this sphere. It is therefore vital to hold out for the inclusion of items pertaining to countering and preventing ill-treatment of children, including in the family.

PARLIAMENTARY HEARINGS ON COUNTERING GENDER VIOLENCE

An important event with national importance was the organization and holding of parliamentary hearings entitled «The situation with regard to countering gender violence» on 21 November 2006. The participants stressed that violence is a major obstacle towards ensuring human rights and fundamental freedoms. Violence against women is a violation of human rights, with its very nature depriving a woman of the opportunity to enjoy fundamental freedoms.

The problem is that four months after the parliamentary hearings, their recommendations had still not been affirmed by the Verkhovna Rada. They were twice put to the vote, but were voted down by the ruling coalition. The recommendations have been redone in the same way as the government programmes mentioned above, however even in their abbreviated form they have still not been passed by parliament.[8]. This ignoring of the issue is happening against the background of 2007 having been declared by the Council of Europe the year against gender violence.

«16 DAYS OF ACTIVISM AGAINST GENDER VIOLENCE»

This event has been held in Ukraine since the beginning of 2000 with the active participation of civic organizations, as well as the Ministry for Family, Youth and Sport. During 2004-2005 the Ministry of Internal Affairs through a special instruction from the Minister or Deputy Minister approved a plan of measures involving the Ministry in «16 Days of Activism against Gender Violence».

[8] As of 3 April 2007

These measures included provision of consultations by specialists from the Department of Public Safety within the MIA to the National Help Line on issues of violence and protection of children's rights and from the Department on Fighting Human Trafficking Crimes; lectures and training seminars for students from schools, technical colleges and institutes in various regions on «Preventing human trafficking», «Preventing violence in the family»; participation in different kinds of events including press conferences, roundtables, conferences, holding nationwide operations «Way of life». There was no such instruction from the MIA in 2006.

PROBLEMS IN COORDINATING THE WORK OF GOVERNMENT STRUCTURES INVOLVING IN COUNTERING VIOLENCE

The responsibility for coordinating work with other government bodies on preventing and countering violence in the family is vested with the Ministry for Family, Youth and Sport.

This is complicated, particularly at district and city level, by the small numbers of staff in departments on family and youth matters (1-2 members of staff who are expected to run all the Ministry's programmes), as well as by the large percentage of time devoted to sport issues.

The problems involved in implementing government policy against violence in the family are exacerbated by the poor level of efficiency of the central authority. The latter is responsible for issues which are unrelated to one another, namely the development of professional sport and social problems of the family, young people, women and gender equality. The government cannot ensure efficient governance in this sphere under the present arrangement.

Furthermore, the Cabinet of Ministers has yet to appoint a person who will carry out coordinating work in this area[9], although all member states of the Council of Europe had elected such coordinators back in 2006. The lack of a coordinator from the central authorities demonstrates the dismissive attitude of the present Cabinet of Ministers to issues linked to countering violence. The Verkhovna Rada has appointed such a person.

3. THE MAIN PROBLEMS EXPERIENCED BY VICTIMS OF VIOLENCE IN THE FAMILY

One of the greatest problems is receiving help for full rehabilitation. Whereas civic organizations can provide legal, consultative and psychological assistance to victims, to provide medical care one needs to have a licence (a private doctor), and this can only be gained by a person formally engaged in commercial activity. Since civic and charitable organizations are not allowed to engage in such activities, they are unable to receive such a licence.

The problems involved in given specialized medical aid to victims of violence[10] – include the «conspiracy of silence» (when the victim avoids any appeals for help since s/he encounters no understanding of the problem from those around); lack of knowledge and prejudice among the public towards the psychiatric service; an insufficient legal base; the declarative nature of many legal provisions (for example, those about protection for victims and witnesses). At the present time there are no national clinical and epidemiological data for the country as a whole on psychological problems among victims of violence in the family. A State service for medical and social assistance is still only at the embryonic stage.

At the end of 2006 a doctrine had been developed for medical and social assistance to victims of violence, an organizational model had been prepared for the relevant body, and optimum ways of implementing this were being worked on. At the end of 2003 propositions had been submitted to the Ministry of Health with these resulting in Ministerial Order No. 38 from 23 January 2004 «On approving measures to implement the Law of Ukraine «On the prevention of violence in the family» and the «Sample Regulations on medical and social rehabilitation centres for victims of

[9] As of the beginning of April 2007.

[10] In preparing material on the provision of specialized medical care to victims of violence figures and findings developed by Y.V. Onyshyn were used.

violence in the family». The Department for the Organization and Development of Medical Care to the Public within the Ministry of Health sent Letter No. 33 from 23 January 2004.

Responses to the letter addressed to the Ministry of Health were received from all regions expect the Dnipropetrovsk, Zhytomyr, Odessa and Cherkasy regions.

The responses showed that in accordance with the said Order No. 38 from 23.01.2004 only two medical and social rehabilitation centres for victims of violence in the family had been created, one in Chernihiv, the other in Sevastopol. Here it must be mentioned that even those two centres had been opened on the territory of psychiatric and drug dependence institutions, thus meaning that the principle of destygmatization їwhich is stressed in the Sample Regulations on medical and social rehabilitation centres has not been observed which significantly reduces the number of potential visitors. Nor do these centres have live-in units this making it impossible to provide temporary shelter for the victim of violence away from the aggressor. They also fail to provide victims with full specialized medical care.

There are a number of medical institutions which provide medical and social assistance to victims of domestic violence, although they are not designated as permanent medical and social rehabilitation centres for this group of people. Such institutions exist in the following regions: Vinnytsa (1 institution); Donetsk (1), Luhansk (1), Lviv (2), Kyiv (4), and in two other regions – Transcarpathian and Mykolaiv – there are consulting rooms with such a profile. In the Volyn and Kharkiv regions there are only plans to open such institutions. This meant that at the end of 2006 there were only 16 medical institutions in the country providing medical and social assistance to victims of violence in the family which is far too few to cater for the needs of the entire population.

4. THE WORK OF CIVIC ORGANIZATIONS TO PREVENT AND COUNTER GENDER VIOLENCE

One could not call work against violence one of the main focuses for civic organizations in 2006. This is not so much because the violence is not an issue, quite on the contrary, since it is a serious problem in Ukraine. It was linked rather to low activeness of donors and international organizations. In 2006, for example, the UN Equal Opportunities Programme virtually folded all its programmes.

The OSCE Project Co-ordinator in Ukraine organized analysis of current legislation in this area and ran a roundtable at the end of November 2006 in Kyiv with the involvement of experts from abroad, government structures, civic and other international organizations.

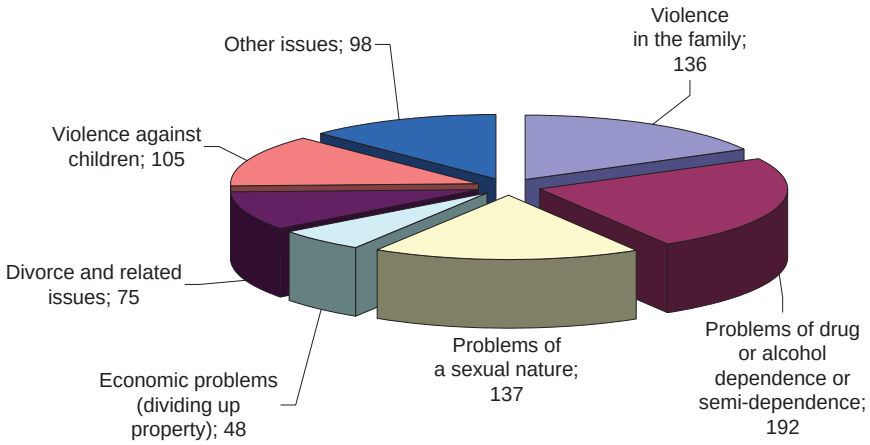
The global campaign against domestic violence «STOP Violence against Women» was launched by Amnesty International back in 2004. Amnesty International in Ukraine has taken an active role in this campaign. On 21 November 2006, on the eve of the action «16 Days of Activism against Gender Violence», it gave a press conference at which it made public the AI report on the situation as regards domestic violence in Ukraine «Domestic Violence – Blaming the victim»[11]. At the regional level there are a number of active civic organizations, including the Western Ukrainian Women's Information Centre (Lviv), «Nadiya» [«Hope»] (Kharkiv), «Family Home» (Poltava) and others.

The International Women's Human Rights Centre «La Strada – Ukraine» is developing work on prevention of violence in the family. One of the main focuses of this work has been a National Help Line for the prevention of violence and protection of children's rights 8 800 500 33 50, (+38 044 205 36 94 for calls from Kyiv and from abroad) which was first started in November 2004.

Anti-domestic violence posters have been prepared for local police units: «Knowledge of the law can protect you» (in cooperation with the Ministry for the Family, Youth and Sport and the Ministry of Internal Affairs), as well as bookmarks on prevention of domestic violence «My Rules of Safety».

[11] The report was prepared by the AI research unit on Europe and Central Asia based on the results of monitoring of women's rights in Ukraine, reports of specific incidents and two visits to Ukraine in 2005 and September 2006

Statistics for calls made to the National Help Line for the prevention of violence and protection of children's rights (30 November 2004 – December 2006). 692 calls in all A breakdown in terms of reasons for the call (one call might include several issues)



Sharing the concern of the international community and human rights organizations and considering the use of corporate punishment to be unacceptable in a civilized society, La Strada – Ukraine launched a programme at the beginning of 2006 entitled ***«Ukraine free of corporal punishment of children»***. The programme is intended to run for three years, and if needed, this period will be extended.

In 2006 two projects were started focusing on prevention of violence. They are being run by the civic organizations «School of Equal Opportunities» and the International «Rozrada» Centre, with the financial support of the United National Development Fund for Women UNIFEM. A number of conferences on violence in the family were held during the year: the conference «Preventive work against violence in the family: work with school-age children»; the seminar: «Overview of the normative legal basis and system of review into cases of violence against children and in the violence»; training seminars on the topic «Sexual violence against children: identifying the victims and providing social and psychological help».

5. CONCLUSIONS AND RECOMMENDATIONS

On the basis of the information and analysis above, we can identify main violations of human rights reflected not only in the violence itself, but in the implementation (or lack of implementation) of government policy in this sphere.

The failure of the law enforcement agencies to protect people against violence in the family is seen in the following:

– Police officers do not go out to everyday calls which to them include cases of domestic violence;

– Prosecutor's office staff are reluctant to issue permits for protection orders;

– Prosecutor's office staff and judges are not only unfamiliar with the provisions of the Law «On prevention of violence in the family» but are even unaware of its very existence12.

– The absurd need to approach the police three times before the perpetrator is arrested, although any incident can end in a fatality;

[12] According to figures received during a discussion with district police inspectors on 28 March 2007 during the opening of a school of district police inspectors in Kyiv, organized by the Centre for Work with Women of the Kyiv City State Administration, the Central Department of the MIA in Kyiv and the International «Rozrada» Centre.

– The existence of a provision on victim behaviour (this may be removed if draft law No. 253913 is passed);

– Police staff do not have the necessary knowledge and skills in cases involving family violence;

– Insufficient attention is given to training MIA staff on behaviour and action needed in situations involving domestic violence (this applies both to initial training and to higher educational institutes).

– the responsibility for violence in the family is shifted onto the victims;

– the fact that fines are used as the main form of administrative punishment for perpetrators, this adversely affecting not only their material situation, but that of the family as a whole (these fines may be removed if draft law No. 2539 is passed);

– the lack of possibility of evicting the person guilty of the violence;

– the impossibility of having any influence on those who commit acts of violence under the influence of drugs or alcohol;

A general serious shortcoming in the entire system for organizing work on preventing and countering violence in the family is the focus exclusively on the victims of the violence, while excluding from the area of attention and influence the actual perpetrators. The process of victimization of those who have suffered from violence in the family is thus endorsed and the effectiveness of actions to prevent violence is diminished.

With regard to providing victims of domestic violence with assistance the main problem is the fact that it is effectively impossible to receive medical, socio-psychological and other assistance, as well as short- or long-term shelter where needed. The reasons for this are:

– the lack of an extended system of institutions for victims of domestic violence:

– the shifting of responsibility for financing the creation of institutions providing assistance on local budgets, instead of via financial allocations from the State budget;

– the lack of awareness among the heads of regional administrations, regional councils and bodies of local self-government of the need for prevention of violence and the failure to provide funds for implementing programmes;

– the failure of the Cabinet of Ministers to carry out the provisions of the Law «On prevention of violence in the family» with regard to creating crisis centres, medical and social rehabilitation centres (see section 3 above where detail is given about the difficulties for victims of violence in receiving medical care);

– the Law «On prevention of violence in the family» does not contain provisions making the creation of shelters for victims of domestic violence mandatory.

– according to the Standard Regulations on socio-psychological help passed by the Cabinet of Ministers, assistance in such centres is only provided to people under the age of 35. This is in breach of the Law «On prevention of violence in the family», the Ukrainian Constitution as well as the principles of human rights protection. Not only therefore must the said Law be refined, but also a whole range of other laws and normative legal documents.

– the lack of social housing and the chance to live apart from families where acts of violence are being committed.

– work (if it is carried out at all) is only with the victims of domestic violence and not with the perpetrators. There is no institution where people who have committed acts of violence are worked with in order to formulate different non-violent models of behaviour;

– the need to have registration in order to get into a shelter (for example, in Kyiv). In Chernihiv we learned that there is no such requirement however when the shelters and centres are financed by the local authorities, prosecutor's offices, or Control and Audit Department can demand registration in order to get help. This also violates people's right to receive

[13] Draft Law № 2539 from 14.11.2006 «On amendments to some legislative acts (on improving legislation on countering violence in the family)», tabled by National Deputies K. Levchenko, F. Shpyh, O. Malynovsky. The draft law was passed in its first reading on 22 February 2007. It is available in Ukrainian at: http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=28663.

assistance, making this dependent on place (city, region) of residence and not on the needs of the person.

To some extent a number of the above-mentioned human rights infringements will be resolved at the normative legal level as a result of the adoption by the Verkhovna Rada of the Law «On amendments and additions to some legislative acts of Ukraine on prevention of violence in the family» (draft law № 2539). As mentioned, this draft was passed in its first reading in February 2007.

The draft law proposes removing fines and adding to Article 173-2 § 1 punishment in the form of administrative arrest for a period of up to 3 days, thus removing the violent person from the family, and not the victim.

The adoption of the proposed amendments to Articles 262 and 263 of the Code of Administrative Offences will have a positive impact with respect to preventing offences committed in the family environment and will promote the creation of an effective mechanism for safeguarding the rights and legitimate interests of members of the family involved.

Bearing in mind the fact that domestic violence in the majority of cases is committed under the influence of alcohol, this being confirmed by data from many civic organizations, social workers and law enforcement officers, the need arises to regulate this issue in order to protect victims. The draft law therefore proposes fairly controversial amendments to the Code of Administrative Offences by adding an administrative penalty against the perpetrator in the form of mandatory treatment for alcoholism. In preparing the draft law for its second reading, proposals must be taken into consideration regarding agreeing these norms with those of the Law «On psychiatric help» to ensure observance of human rights.

It is also proposed to add new terms to the Law, such as «corrective work» and «corrective programme», «shelter for victims of violence in the family». At the present time there are specialized institutions for victims of violence in the family, these being crisis centres and medical and social rehabilitation centres. The work is thus carried out exclusive with people who have suffered as the result of violence in the family, yet there is no institution where work is carried out with the perpetrators of the violence in order to effect changes in their behaviour and formulate non-violent models. The draft law proposes a number of amendments on carrying out special corrective work with people guilty of violence in the family.

The draft law suggests removing the term «victim behaviour», as well as Article 11 in full from the Law «On prevention of violence in the family».

RECOMMENDATIONS FOR IMPROVING WORK ON PREVENTION OF VIOLENCE IN THE FAMILY AND PROTECTING THE RIGHTS OF ITS VICTIMS

1. Pass draft law № 2539.
2. Introduce amendments to Order of the Ministry of Health № 33 from 2000 regarding staffing timetables to take into account the needs of medical and psychological rehabilitation centres.
3. Introduce amendments to the Standard Regulations on socio-psychological help removing the age limit (not only up to the age of 35);
4. Introduce amendments to the regulations on centres stipulating that help can be received regardless of whether the person is registered according to place of residence;
5. Heighten public and parliamentary control over adherence to legislation on prevention of violence against women;
6. Toughen sanctions against people who commit acts of violence in the family and establish periods of administrative detention;
7. Impose periods of administrative detention of individuals who have committed acts of violence in the family or breached a protection order, prior to the review of the case in court;
8. Introduce alternative forms of punishment for people who have committed acts of violence in the family, in particular, imposing community work and mandatory participation in rehabilitation programmes which will help reduce the process of criminalization of domestic offenders;
9. Resolve the issue of isolating individuals who commit acts of violence in the family with their further rehabilitation;

10. Create special units for carrying out rehabilitation work with aggressors within specialized institutions for victims of violence in the family;

11. Establish administrative liability for propaganda of violence and brutality;

12. The Cabinet of Ministers should develop a comprehensive range of measures to implement at national level the Council of Europe's campaign to eliminate violence against women;

13. Publish in Ukraine and have distributed Recommendation No. R (2002) 5 of the Committee of Ministers of the Council of Europe and Explanatory Memorandum;

14. Prepare by 1 January 2007 a National Report on Ukraine's fulfilment of the above-mentioned Recommendation No. R (2002) 5;

15. Draft and adopt a National programme for countering domestic violence in Ukraine;

16. Provide for the functioning in each Ukrainian region of institutions for victims of violence in the family, crisis centres, socio-psychological help centres, shelters, services for medical and social rehabilitation, etc;

17. Ensure legal aid for victims of violence in the family, including women exclusion from social contact, migrants and refugees who have recently arrived in the country, members of minorities and women with restricted possibilities;

18. Ensure sufficient financial and material backup for the work of structures and institutions carrying out measures aimed at preventing violence in the family;

19. Develop a system for financing crisis centres and shelters for victims of violence out of the State budget. Shifting responsibility for financing these institutions to local budgets means that victims of violence in different regions have unequal conditions, whereas all are equally entitled to the same scope of assistance and protection.[14]

20. Carry out monitoring of the quality of services provided to victims of violence and improve implementation of the Law «On prevention of violence in the family» through introducing systematic gathering of information about enforcement of the said Law's provisions.

21. The Ministry for the Family, Youth and Sport should study the question of introducing in departments on the family and youth of district administrations and city executive committees posts for specialists on prevention of violence in the family and on measures against human trafficking in order to coordinate work in these areas;

22. Create at the national and regional levels the relevant database of government structures and civic organizations whose work is directed at preventing and countering all forms of violence;

23. Ensure early identification of families where there is a problem with violence or where there is a real danger of such violence being committed, and organize social accompaniment for those families;

24. Involve civic organizations in measures aimed at countering domestic violence; support the activities and promote the further development of the network «Men against violence»;

25. Gather and regularly publish statistics on the scale of domestic violence in Ukraine, on measures to prevent it, as well as monitoring court statistics on the outcome of hearings into cases involving violence in the family;

26. Summarize practical application of legislation on countering violence in the family. Collect and circulate the best practical recommendations on preventing violence in the family, protecting victims and prosecuting criminals at national, regional and local levels;

27. Review the role of the prosecutor to enable prosecutor's offices to launch criminal investigations in the absence of a formal statement from the victim of violence. This will reduce the risk of the perpetrator being able to influence the victim and it becomes impossible for a perpetrator to apply for the investigation to be terminated.[15]

28. The Ministry of Internal Affairs must ensure efficient consideration of appeals and reports of actions of violence in the family and eliminate cases of refusals to register such appeals;

[14] Recommendation from the Amnesty International Report «Domestic Violence – Blaming the victim», available from the AI website at: http://web.amnesty.org/library/Index/ENGEUR500052006?open&of=ENG-UKR.
[15] Ibid.

29. The Ministry of Education and Science should include the issue of violence in the family as a human rights problem and an issue of the state of society in curricula at all institutions for employees of the court and law enforcement bodies, medical staff, social workers, teachers and others. Courses on prevention of violence in the family and help for its victims should be added to the educational programmes for institutes training psychologists, educational workers, lawyers, law enforcement officers, social and medical workers;

30. The State Committee of Statistics should improve the system of State statistical reporting on prevention of violence in the family by developing forms for reporting on this and introducing reporting on violence and brutality against children. They should ensure the systematic gathering of statistical data with a breakdown under the Article into types of violence.

XXI. THE MAIN HUMAN RIGHTS VIOLATIONS LINKED WITH HUMAN TRAFFICKING[1]

1. HUMAN TRAFFICKING AS HUMAN RIGHTS ABUSE

Trafficking in human beings is viewed as violation of human rights which countries must take responsibility for. This is actively declared both at international and domestic level. Practical implementation of this approach, however, is proving difficult.

A crucial stage in affirming this concept was the World Conference on Human Rights in Vienna, 1993, when violence against women was first official recognized as a violation of human rights. It is from the position of human rights protection that a number of international documents have been drawn up over recent years on combating human trafficking. These include the Hague Ministerial Declaration on European guidelines for effective measures for prevent and combat trafficking in women for the purpose of sexual exploitation (1997), the UN Convention against Transnational Organized Crime (2000); including its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, the Brussels declaration on preventing and combating trafficking in human beings (2002), the Council of Europe Convention on Action against Trafficking in Human Beings CETS No.: 197 (2005 p.) and others which stress that human trafficking is a violation of human rights.

Problems arise in moving from declarative provisions to formulating a policy of «positive action» based on raising and strengthening the status of the individual in society, their rights, which excludes the very possibility of buying or selling people.

The following basic rights are violated in cases of human trafficking:

The right to life, liberty and security of person: unwarranted detention or arrest mean that they were carried out with violations of current legislation; the period of detention is not indicated, or specific charges are not laid, and sometimes such detention can end in the death of the detainee.

Freedom from slavery, this including forced labour without payment or debt bondage.

The right of freedom from torture, cruel or inhuman treatment: victims of human trafficking are very often subjected to physical or psychological coercion, rape and torture. During detention they are sometimes treated in a degrading manner.

Equality before the law: the attitude of judges and other representatives of the judiciary to victims of human trafficking is very often dependent on their gender, race, nationality, origin, and whether or not they have legal status. It quite often happens that charges are laid not against the human traffickers, but against their victims.

Freedom of movement and of residence: these rights are violated when a person has their passport, visa etc taken away or imprisoned.

The right to work and to form and join trade unions: people sold into labour are unable to either create or belong to trade unions and can do nothing to improve their working conditions.

[1] By K.B. Levchenko, O.A. Kalashnyk and M.V. Yevsyukova, International Women's Human Rights Centre «La Strada – Ukraine»

The right to a decent standard of living: victims of human trafficking are very often deprived of proper nourishment and forced to live in bad conditions, and they can be refused medical care. They also risk infection where there is a ban on using condoms.

The right to rest: it is a violation of human rights to force a person to work more than a certain number of hours a day and without a day off. This is very often infringed in the case of women employed for housework.

Freedom to marry: women's rights are violated when they do not enjoy equal rights with their husband, or when they are forced to marry against their will.

Human trafficking is in itself a violation of human rights however it is also the result of violations of other human rights. For example, data from civic organizations indicate that a majority of women victims of human trafficking regularly suffered from domestic violence[2]. Factors for the spread of human trafficking can also be interpreted through a complex of human rights abuse.

2. AN OVERVIEW

The problem of human trafficking manifests itself to varying degrees in different regions of Ukraine. The situation is especially difficult in the West – the Rivne, Ternopil, Chernivtsi, Volyn, Transcarpathian and Lviv regions where there may be several members of a single family registered at employment centres. In the Ivano-Frankivsk region alone, out of a population of 1,460 thousand, 250 thousand are working abroad. According to unofficial figures, between 150 and 350 people from the Lviv region are working abroad, and the situation is no better in other western regions.

It should be noted that the attempts of potential labour migrants to find work abroad has led to criminal gangs organizing travel documents and in fact sending them abroad to be sold into exploitation.

From 1998 – 2006, according to figures from the Ministry of Internal Affairs [MIA], more than **1660** crimes covered by Article 149 of the Criminal Code (human trafficking) were identified. This number, furthermore, has been increasing each year (1998 – 2; 1999 – 11; 2000 – 42, 2001 – 89; 2002 – 169; 2003. – 289, 2004. – 262, 2005 – 415, 2006 – 37).

The statistics for cases reaching the court are of interest. The MIA's figures show that in 2002 out of 169 registered cases 139 resulted in court proceedings; in 2003 226 out of 289; in 2004 260 out of 269; in 2005 only 357 out of 415 and in 2006 317 out of 376. According to the State Judicial Administration the number of criminal proceedings under Article 149 (124-1) of the Criminal Code examined by appellate and local courts over the years 2002-2006 were 36, 62, 74, 96 and 99 respectively. 86 people were convicted of human trafficking offences in 2006[3].

Information received both directly from trafficking victims and from civic organizations working with victims and providing various types of assistance suggest a high level of corruption in the courts hampering objective judgments. This means that the uncovering by MIA officers of a crime does not yet mean that the perpetrators will be punished.

At the end of 2006 information was received for the first time from victims about a possible link between a police unit and traffickers.

Trafficking in «live commodities» as an asocial and criminal phenomenon tends to adapt to new conditions, changing its form and methods depending on the economic and social situation in any given

[2] Domestic violence is not only a human rights violation. It has also been recognized as a factor pushing women into the clutches of human traffickers. Staff of the Women's Consultation Centre, an NGO which runs a help line for potential trafficking victims in Dnipropetrovsk told Amnesty International that around 50% of women trafficking victims whom they have helped had suffered from violence at home before falling victim to traffickers. (from an AI report «Domestic violence: accusing the victim» http://www.helsinki.org.ua/index.php?id=1164375558). The International Women's Human Rights Centre «La Strada – Ukraine» received so many appeals regarding domestic violence on its National help line for combating human trafficking that it was forced in 2004 to open a separate help line with a different number exclusively on issues regarding prevention of violence and protection of children's rights. More detail can be found about this issue in the section «Main human rights problems in cases of domestic violence»..

[3] From information in a response from the First Deputy Head of the State Judicial Administration to a deputy appeal from National Deputy K.B. Levchenko (№ 133-07-03/3 from 06.02.2007).

country and in the world as a whole. This means that over time: criminal gangs change their approach, their methods and the ways they recruit people, while vulnerable groups also change. The following changes can be highlighted: men are becoming victims of trafficking; there are less woman over 35, and more young women from 15 – 19 being taken away for work in the sex industry. As well as victims becoming younger, there is also a trend towards child slavery and information is emerging of cases of child human trafficking. The criminals are more demanding with regard to the «qualities of the commodity». The number of victims exploited not in the sex industry, but for housework, at semi-legal or illegal workshops and factors (victims between 30 and 50). Traffickers are finding new places for recruiting victims (increasingly in rural areas), and the recruitment is becoming more camouflaged and secret. The recruiters are taking on more work: they find the people; organize their documents; take them across borders and pass them over to the buyer abroad, receiving their money immediately. Previously the recruiters only found people and organized papers, while the rest was done by other criminals, however the recruiters sometimes did not receive the money they'd been promised. Trafficking within the country is also spreading, aimed at drawing children into the porn business or prostitution, including commissioned by foreign nationals. The types of trafficking and ways of transporting people abroad are changing, and the scale of the problem is ever increasing.

From analyzing the appeals reaching La Strada – Ukraine in 2006, one can note an increase in cases linked with children's rights. This includes attempts by people from other countries to adopt Ukrainian children; illegal attempts by one parent to take a child abroad, etc.

Of particular concern is the spread of a new form of sexual exploitation – sex tourism, especially where this involves children. Child sex tourism is «the commercial sexual use of children by people who come from their own country to another, usually less developed, country to engage in sexual activity with children.».[4]

Back in spring 2005 Ukraine removed visa requirements for people from the European Union, Canada, USA and some others. In so doing, it demonstrated to the world its openness to democratic transformations, as well as to the European community and readiness for European integration.

It must be said from the outset that the opening of borders and removal of visa restrictions, is not a cause of child sex exploitation, sex tourism and the use of foreign children in prostitution and pornography, however it has been a factor in the escalation of these ills. A lot depends on the image which is created about a country, the circulation of advertisements for erotic and sexual services in the mass media and tourist publications.

Anonymity, the availability of children, the sense of all being possible and of being a rich man from a civilized country compared with poor citizens of «Third world» countries, being removed from their own country, from moral, social and legal restrictions which in their normal life govern their actions, etc, are the factors at play around sex tourism. Furthermore, experience shows that such tourists very often excuse their own behaviour by claiming that they are actually helping children when they pay them money. No thought is given here to how the money is earned and what consequences this might have for each child.

Sex tourism is a crime which carries fairly hefty punishments in many countries. It is, however, also a crime which is extremely difficult to prove, with a high level of latency. The seriousness of the problem also lies in the fact that the victims of such sex tourism are very often underage or even children. Bearing in mind the large number of orphans, neglected children and street kids in Ukraine, as well as the attraction for children in earning some money, a significant increase in this kind of crime can be expected.

According to MIA figures, there have, in fact, already been cases identified of sexual tourism involving people from France, Sweden, the USA and some other countries. The contact is first established via the Internet and the children are found by Ukrainian nationals who are often themselves underage and from unfavourable family conditions. The difficulty of providing this crime is even greater than in proving crimes linked with human trafficking. It is virtually impossible since, for example, pornographic materials are stored in digital format which can be destroyed in a matter

[4] Questions and answers about the commercial sexual exploitation of children – ECPAT information pamphlet – Bangkok, 2001, p. 6.

of seconds, thus eliminating material evidence and leaving the perpetrators untouched. Victims very seldom give testimony.

In the present Criminal Code two articles for combating sexual tourism may generally be applied: 156 «Corruption of minors» and 301 «Import, production or sale and circulation of pornographic items». However only the crimes outlined in paragraph 3 of Article 301[5] and paragraph 2 of Article 156 are classified as serious. Article 149 on human trafficking has not been applied in combating this crime.

Unlike other countries of Central and Eastern Europe, attention is not given in Ukraine to specific features of trafficking in human beings and children, for example, among the Roma people.

3. VIOLATIONS OF A RANGE OF HUMAN RIGHTS IN UKRAINE AS A CAUSE OF HUMAN TRAFFICKING

Among the external and internal factors leading to the spread of human trafficking in post-Soviet countries, certain trends can be observed.

The following are traditionally highlighted as contributing factors: unemployment; the low standard of living; lack of legal awareness among the public; an unrealistic notion of how easy life is in Western countries; the lack of real information on the issue; the sexualization of life; sex ads; globalization of the economy active international trade migration, as well as the possibility now for Ukrainian nationals to travel, etc.

The difficult economic situation is first among factors, with the feminization of poverty encouraging women to seek any earnings often without taking possible adverse consequences into consideration. Researchers from various countries have noted that in this situation women are more likely to agree to work which does not match their level of education and qualifications, whereas men in similar situations hesitate. There is a growing number of families where women are the main breadwinners, bearing the burden of responsibility for the entire family.

However, whereas 5-8 years ago, the main factor was unemployment, these days both women themselves and specialists stress that it is not so much unemployment which causes poverty, as extremely low wages, with these not exceeding the poverty line even for well-qualified work (doctors, medical personnel, teachers, among whom an absolute majority are women). This leads to both poverty and a sense that there is no way out. A unique phenomenon can be observed in the massive reduction in the standard of living of the part of the population which by world standards is considered the middle class. All of this pushes Ukrainian nationals to seek work abroad. At the same time the most accessible way of earning money abroad for women is the sex industry, moreover its illegal variety. Direct conversations with women who want to go abroad to work, and with those who have returned from such trips, suggest that a contributory factor in the spread of human trafficking remains the fact that Ukrainians are ill-informed about possibilities for employment abroad, as well as about the consequences of being there illegally.

Ineffective political and economic transformation in the country, corruption among officials, the declarative nature of social policy, the deepening divide between those at the top and an absolute majority of the population and the fact that the romantic dreams of the first years of independence were not fulfilled, have all led to one other factor, namely a lack of belief in the possibility of positive changes in the country. The most terrible part is that young people do not see a future for themselves and the possibility for self-fulfilment in Ukrainian society. Nor do parents see a future for their children. Higher education is no guarantee of a normal level of life. Going abroad is seen not only as a way of resolving temporary financial problems of the family, but as also a strategic move in life for the young generation. Clearly information campaigns cannot in this case be viewed as a method combating the ill – major changes are needed in the governance of social and political processes in society.

[5] 301 § 3 imposes liability for the same import, production etc of pornographic items if done repeatedly, by an organized gang, as well as where minors have been forced into taking part in producing such material; 156 § 2 imposes liability for corrupting a small child, or where a parent or person replacing them is guilty. (*translator*)

The situation is exacerbated by the fact that the process of migration swiftly takes on criminal aspects since there are too few legal possibilities for travelling abroad to work to cater for all those wishing to. Specialists ever more frequently name the growing criminalization of society as one of the factors encouraging the spread of human trafficking.

There have also been certain changes in the group of legal factors. A law was passed against human trafficking, but there is as yet no truly functional system for protecting victims from the traffickers in «live commodities» in Ukraine, nor is there a law on social protection of Ukrainian nationals abroad.

The causes of human trafficking must also be sought among external factors, including the opening of the borders which simplifies tourism and looking for work; the internationalization of the shadow economy; the formation of international criminal organizations; an increasing divide between rich and poor countries; legislation in many countries which is lenient with regard to prostitution; the globalization of the economy and of migration. It is quite clear that it is difficult and virtually impossible to eliminate these global factors. They must, however, be studied, understood, in order to take them into account in anti-trafficking measures.

An important factor which formed and emerged at the beginning of the new century is the presence of a so-called social network abroad. According to research carried out by the ILO, the majority of migrants, both those doing well, and victims of human trafficking, have a relative or close friend abroad who helps inform them about chances of finding work abroad, and considerably eases the process of leaving. The greatest risk of becoming a victim of human trafficking is faced by people who go to far off countries in order to find illegal work via intermediaries who take on the financing of the trip – organizing passport and visa, and buying tickets. These extra payments provide an additional factor preventing people from changing their mind and not going if doubts have arisen regarding their safety. They also become the reason why migrants cannot leave their jobs when they want to since they would have to return the money.

HUMAN TRAFFICKING AND ILLEGAL MIGRATION

Specialists and representatives of civic organizations are increasingly critical of attempts to equate human trafficking with illegal migration. Such an approach leads to the «simplest» countermeasures – strict visa restrictions at the border and criminalization of illegal migration. Ukrainian nationals have already experienced the negative consequences of this approach being applied by countries of the European Union who are creating a new «iron curtain» distancing themselves from so-called «third» States.

This kind of policy makes it difficult to exercise the right of freedom of movement. Having broken free of the prohibitions which prevailed in Soviet times, Ukrainians have ended up in a trap created by «democratic countries».

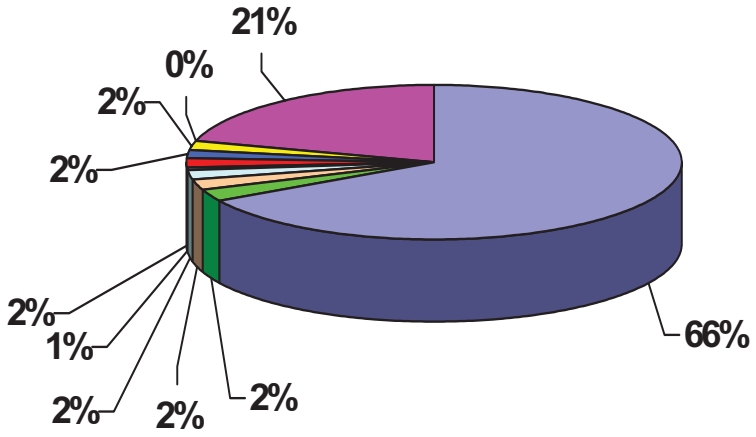
A huge number of people who ring the La Strada – Ukraine help line allege corruption in foreign embassies in Ukraine making it almost impossible to receive visas. The following specific complaints can be highlighted: people approaching a particular embassy sometimes encounter overt suggestions from consulate staff to pay a certain amount in order «to speed up» the visa process. Almost all those who have stood in endless queues outside an embassy have received offers from certain individuals to ease the procedure for obtaining a visa and save time if they pay a fair sum. Unfortunately many of our fellow citizens are forced to take up such offers because the process for obtaining a visa takes so outrageously long. So where is the justice, and should those do who don't have Euros to spare on increasing their chances at the embassy?

Often people planning to go abroad turn to various agencies (go-between firms helping people find jobs, tourist agencies, etc), and entrust them with the entire process of getting documents and a visa. However by no means all of them realize that their documents quite often do not even reach the embassy and that there are «experts» who can themselves put rejections in the passport. It should be remembered that as a rule a person seeking a visa has to personally come to the embassy for an interview. However it often happens that employees of such firms do manage to get visas for their clients. Then the question should be asked of how they achieve this. This is clearly not cheap for those who approach the agency.

Generally Ukrainian nationals go abroad *for work* and look for any possibility of getting there. This is confirmed by studies and an analysis of phone calls to the national help line on avoiding human trafficking attached to La Strada – Ukraine (75% of phone calls are about going abroad in order to work). The methods of recruitment for such «work» are varied while at the same time traditional for this sphere.

They may in the first instance be advertisements for jobs abroad. They are published in all newspapers offering work to Ukrainian nationals.

A concept analysis of newspapers showed that each issue publishes on average between 10 and 20 «dodgy» ads, mainly with invitations to young and attractive women. Here are the most typical examples which give food for thought: «Work in the best European clubs for young women from 18 – 30. All expenses paid by the firm. Monthly wages starting at 1500 US dollars». After that there's an address where the job interviews will take place. Or this ad: «Work. All construction professions, labourers (factory workers), agricultural work, drivers, domestic workers and nannies. Canada, Cyprus, France, Israel, Spain, Iraq, Ireland, Kazakhstan, Namibia, Portugal, Russia, South Africa, South Korea, United Arab Emirates, United Kingdom and the USA. Men and women aged from 18-55. Quick arrangement of documents and visas». And some other advertisements in the same newspaper.



Statistics for calls made between January and December 2006
Total number – 4720
66 % – consultations regarding work or holidays abroad
2 % – consultations about studying abroad;
2 % – looking for ways of returning to Ukraine;
2 % – inquiries about people having disappeared while abroad
1 % – questions about going abroad to live
2 % – phone calls from people who have returned to Ukraine, or from their relatives
2 % – consultations on marrying foreign nationals
2 % – consultations on divorcing foreign nationals and issues over getting children back
0 % (2 calls) – consultations over court proceedings in human trafficking cases
21 % – others, including:
– Organizational questions regarding helping victims;
– La Strada consultations to journalists
– La Strada consultations to employment centres;
– Interviews given to media outlets;
– Applications for seminars, lectures, training seminars;
– Calls beyond the competence of the organization.

4. DEFINITION OF HUMAN TRAFFICKING

By ratifying in 2004 the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (2000), Ukraine recognized a broad definition of human trafficking which does not only include trafficking in women for the purpose of sexual exploitation, as was the case in the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).

Human trafficking is defined as: *«the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs»*[6]

The adoption of an international definition of human trafficking is a major step forward in organizing adequate anti-trafficking measures. It makes it possible to lay the legal foundations for overcoming long-standing stereotypes in society which have equated human trafficking with prostitution. The general theoretical discussions around this definition and the phenomenon involved have enormously helped formulate strategic policy aimed at elimination and avoidance of particular types of trafficking. An unclear definition leads to vagueness in interpretation with different things being understood by the same term, leading to lack of standardization, or similar to lack of any action.[7]

For example, almost every article in the media on the subject of human trafficking is to this day accompanied by photographs of women sex workers. The very names of the articles speak for themselves, for example: «A woman isn't a commodity», «Girls on call», «Credulous Ukrainian women become sex commodities», or «I'm a sex slave», etc.

As a result of this stereotype there was general stigmatization of human trafficking victims as being people involved in the sex industry (without even considering whether this had been through coercion or voluntary). This further complicated the process of providing victims with assistance. It also made trafficking victims afraid of cooperating with the law enforcement agencies, with them refusing to give testimony out of fear of prosecution for having engaged in prostitution. This, incidentally, is made great use of by human traffickers who blackmail their victims, by claiming that cooperation with the police will get the victims behind bars while «we'll buy our way out».[8]

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[6] It is worth mentioning that the given Protocol is based on «Human Rights Standards for the Treatment of Trafficked Persons», drawn up by nongovernmental organizations – the Global Alliance against Traffic in Women»; the Foundation against Trafficking in Women [the Netherlands] and the International Human Rights Law Group (USA). They are aimed at promoting respect for the human rights of individuals who have been victims of trafficking, including those who have been subjected to involuntary labour and/or slavery-like practices. They set out the rights of trafficked persons to legal defence, humanitarian aid and compensation for material and moral damages, as well as to rehabilitation. The standards provide a stimulus for turning to the authorities and appearing as witness. The document is essentially an appeal to all nations to guarantee victims:

– freedom from persecution;
– confidential medical and psychological assistance;
– qualified interpreters during the investigation and court proceedings, or at public hearings;
– free legal aid;
– that their past will not be used against them, their family or friends (i.e. the accused must not be able to make use of the fact that the woman worked in the sex industry);
– confidential tests for AIDS only with the consent of the individual in accordance with the World Health Organization regulations, taking into account international consultations regarding AIDS and human rights provisions (quoted by K.B. Levchenko in «Human trafficking» and «Trafficking in women» Problems in formulating terminology and contemporary documents – Visnyk, Department of the MIA, Kharkiv 2000, No. 11.

[7] «Human trafficking» and «Trafficking in women» Problems in formulating terminology and contemporary documents – Visnyk, Department of the MIA, Kharkiv 2000, No. 11.

[8] According to information from the national help line on avoiding human trafficking attached to La Strada – Ukraine

In addition, victims were invariably seen as being only women.[9] As a result men who had suffered from the crime were stigmatized, or simply not recognized as being victims, this leading to further violation of their rights where various types of assistance were needed, rehabilitation and reintegration programmes, etc.

Research into human trafficking involving men in Ukraine was carried out in 2006 by the International Organization for Migration however the results have yet to be made available.[10]

5. IMPROVING UKRAINIAN LEGISLATION

Ukraine's ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime [the Protocol] brought with it the need to introduce amendments to current legislation, in particular Articles 149 and 303. Legislation for combating human trafficking had the following flaws:

– the Article gave one of the elements of the crime being that a person had been taken with or without his/her consent across Ukraine's border. This made it impossible to initiate criminal proceedings in cases of human trafficking committed in Ukraine;

– the formulation of the crime was not specific enough, with there being no criminalization of the act of buying a person;

– the norm did not add deception as a qualifying feature;

– the definition of human trafficking lacked such elements of the crime as recruitment, transfer and transportation of a person.

On 12 January 2006, therefore, the Verkhovna Rada adopted the Law «On amendments to the Criminal Code of Ukraine on increasing liability for human trafficking or engaging people in prostitution». This introduces new versions of Articles 149 and 303 of the Criminal Code.

In brief, the following points should be highlighted with regard to the new version of Article 149:

1) it has brought the definition and understanding of human trafficking closer to that given in Article 3 of the Protocol;

2) the part of the definition regarding a person's being taken with or without his/her consent across Ukraine's border has been removed, which now makes it possible to initiate criminal proceedings over cases of human trafficking committed in Ukraine;

3) recruitment, transportation, transfer, harbouring or receipt of a person have been added as denoting human trafficking;

4) explanation of such elements of the crime as «exploitation» and «vulnerability»;

5) liability is differentiated for trafficking in small or underage children;

6) the explanatory note stipulates that «Liability for recruitment, transportation, harbouring, transfer or receipt of a small child or minor under this article shall be imposed regardless of whether such actions were committed with the use of deception, blackmail or the vulnerability of the said persons, or with the use of the threat or use of force, through abuse of office, or by a person on whom the victim was financially or otherwise dependent»

The new version of Article 149 demonstrates that Ukraine has complied with its international commitments regarding criminalization of human trafficking, and domestic legislation has become more in line with international. While the new norm somewhat deviates from traditional rules for formulating norms of the Criminal Code, it is more complete and workable than that which it replaced.

[9] The first government anti-trafficking programme adopted in 1999 (Cabinet of Ministers Resolution No. 1768 from 25 September 1999) was titled «Programme for trafficking in women and children». Projects run by civic organizations at that time were also based exclusively on prevention of trafficking in women. For example, La Strada – Ukraine had a programme on «Prevention of trafficking in women in countries of Central and Eastern Europe». It was only in 2000 that La Strada moved away from confining its scope to only women.

[10] The research was organized within the framework of the Danish Programme against Human Trafficking.

With regard to Article 303 of the Criminal Code, it should be noted that this new version decriminalizes prostitution. Liability for engaging in prostitution is thus only imposed by the Code of Administrative Offences (Article 181-1), i.e. liability is administrative, not criminal. At present in Ukraine there is criminal liability only for «Drawing a person into prostitution or coercing the person into prostitution with the use of deception, blackmail or the vulnerable state of the person, or by means of the threat or use of force, or the exploitation of the prostitution of others». The norm envisages greater liability if these actions are in respect to a minor, and even greater where a small child is involved. Furthermore, the explanatory note clearly states that: «Liability for engaging a small child or minor in prostitution, or coercing them into prostitution under this article shall be imposed regardless of whether such actions were committed with the use of deception, blackmail or the vulnerability of the said persons, or with the use of the threat or use of force, through abuse of office, or by a person on whom the victim was financially or otherwise dependent»

6. GOVERNMENT POLICY AND COORDINATION OF ANTI-TRAFFICKING MEASURES

During 2006 the text was being agreed within profile groups and departments of a draft Government anti-trafficking programme. In April 2006 a Government Strategy for such a programme was approved, however the actual programme did not actually reach approval stage despite the fact that the strategy is for the years 2006-2010. It was approved by a Cabinet of Ministers Resolution from 7 March 2007 in a much reduced form.

As a result, the Ukrainian Government did not provide a report on its activities in combating human trafficking for that year. In general, access to information concerning plans and results of implementation of government policy in this area is becoming problematical. Government bodies do not avail themselves of modern methods of disseminating information such as the Internet.

An analysis of the organizational and administrative measures envisaged by the Government anti-trafficking programme for 2006–2010 makes it possible to predict both positive results and certain problems which are already becoming clear. Among the problem areas we would point out the coordination and management of the implementation of programme measures; the financing of these measures; adherence to human rights principles when carrying the measures out; the lack of enough qualified specialists who can deal with implementation, financing, as well as monitoring how well the programme is implemented, etc.

It is worth considering this in more detail. We are not dealing here with coordination of the measures. The previous programme[11] placed this responsibility on an inter-departmental Coordination Council created (in accordance with item 1 of the Comprehensive Programme) attached to the Cabinet of Ministers and under the management of the Deputy Prime Minister on Humanitarian Issues. The inter-departmental group was made up of top figures (at the level of deputy ministers and heads of departments) of the profile ministries and departments. International and nongovernmental organizations were invited in an observer capacity. Permanent regional commissions were also formed for coordinating efforts and exchanging information on anti-trafficking measures. It would have been sensible to continue the activities of these institutions during the period of implementation of the programme. However this remains optional, at the discretion of the Government.

Another problem lies in the funding of the Comprehensive Programme measures. As was the case with the previous programme, special government funding has not been allocated for its fulfilment. Instead financing is supposed to come from the ministries with this requiring internal redistribution of ministry budgets and presents a fair number of difficulties. Bearing in mind that the priority for the Ministry for Family, Youth and Sport is the last direction in which most of the funds are allocated, it would be useless to hope for a great deal of attention from the ministry to fulfilling the programme and allocating sufficient funds from their own budgets.

Here one can cite an address given by the Minister for Family, Youth and Sport at a briefing after the signing of the Resolution of the Cabinet of Ministers affirming the Government anti-traf-

[11] This refers to the Comprehensive programme for combating human trafficking for 2006 – 20010 (on the Cabinet of Ministers Resolution No. 766 from 5 June 2002).

ficking programme for 2006–2010. On 7 March 2007 he said that this was the first such programme in Ukraine[12], whereas it is in fact the fourth.

Scrutinizing the programme, one sees that the government is shifting responsibility for many measures onto nongovernmental and international organizations. They are involved in carrying out 11 items out of the 30. The role of nongovernmental organizations in implementing the anti-trafficking programme is vital, and is even stressed in a separate item of the programme which states that the Programme's tasks include «cooperation with civic and international organizations and funds carrying out anti-trafficking work». Nongovernmental organizations, according to the programme are to play a role in implementing the following measures:

1) Analyzing legislative acts on anti-trafficking issues and where necessary submitting proposals to the Cabinet of Ministers on amendments to them;

2) Monitoring domestic legislation with regard to its compliance with international norms on combating human trafficking and, should this be required, proposing amendments to the Cabinet of Ministers;

3) Creating and ensuring the functioning of working expert groups within the permanent regional commissions on exchange of information on combating human trafficking and coordinating anti-trafficking efforts;

4) Organizing training seminars for civic servants on combating trafficking in children and on eliminating the worst forms of child labour;

5) Ensuring training and educational work among diplomatic service personnel on anti-trafficking issues, building international cooperation in this area, as well as in providing support and protection for victims of such crimes;

6) Making a series of theme-related television and radio programmes, introducing in electronic and printed media outlets separate sections for placing information about jobs in demand on the domestic employment market, as well as about the consequences of illegally going abroad to find work;

7) Providing Ukrainian nationals who have fallen victim to human traffickers with legal assistance in returning home;

8) Assisting Ukrainian trafficking victims in seeking work and vocational training;

9) Carrying out monitoring and assessment of the work of rehabilitation centres for trafficking victims and centres of socio-psychological rehabilitation for children;

10) Ensuring coverage in the media of anti-trafficking measures and of help provided to victims of such crimes;

11) Running an annual competition among media outlets and nongovernmental organizations on creating social advertising aimed at combating human trafficking and providing services to trafficking victims;

At the same time nongovernmental organizations themselves run up against a number of significant problems. This involves in the first instance legislative provisions for their activities, financing, help from government structures and bodies of local self-government, as well as funding for NGO programmes.

Ukraine's Budget Code contains fairly discriminatory provisions allowing for funding from the State budget of only some organizations. For example, pursuant to Article 87.9 of the Code, the following may receive State support: civic organizations with nationwide status for the disabled or War veterans; government programmes and measures related to children, youth, women and the

[12] BBC Monitoring, source: UNIAN news agency, Kiev, 7 Mar 07. «UKRAINE ADOPTS ANTI-HUMAN TRAFFICKING PROGRAMME: The Cabinet of Ministers of Ukraine has adopted a state programme for combating human trafficking until 2010. Family, Youth and Sports Minister Viktor Korzh said this at a news conference today. «The programme designed to be implemented by 2010 provides for awareness campaigns and events to be carried out in cooperation with NGOs, foreign missions and the Interpol,» he said. He said Ukraine has not had a state programme for combating human trafficking before. «To date, this problem has gained momentum, therefore it should be addressed at the government level,» he said. He added that the destiny of thousands of Ukrainian children adopted by foreigners remains unknown. «Diplomatic and consular offices cannot trace these children,» he said. Korzh said that the programme provides for broader cooperation between the Foreign Ministry and the Interior Ministry and for the creation of social rehabilitation centres for people who fell victim to human trafficking.

family; government support for youth civic organizations in carrying out programmes on a national scale, and measures related to children, youth, women and the family. This is thus an infringement of the rights of citizens who have formed various civic organizations registered in accordance with the Civil Code and the Law on citizens' associations.

The provision on social commissioning has yet to be drawn up. This means that civic organizations involved in implementing important government programmes are not funded from the State budget.

A major shortcoming in work on combating human trafficking is coordination and monitoring of such work. This has been repeatedly pointed out in studies and assessment of practical experience. It is for this reason that civic and international organizations have begun lobbying for the creation of an office of National Coordinator or that of Rapporteur on combating human trafficking in Ukraine. At present there is debate as to which office would be better. The OSCE Project Coordinator in Ukraine has devoted particular attention and effort to creating the office of National Coordinator, yet to date no office has been formed.

PROTECTION FOR VICTIMS AND REINTEGRATION

Representatives of both nongovernmental organizations and government bodies see a major problem in the lack of any mechanism for returning trafficking victims from abroad. Furthermore, those who return often have serious problems with their health and this must be taken into consideration in further communication and work with them. There is psychological damage which law enforcement personnel should also bear in mind when investigating the case.

Victims mainly receive help from international and nongovernmental organizations. In 2006, for example, the International Organization for Migration [IOM] assisted 937 people. The destination countries where most of the trafficking victims returned from were Russia, Turkey, Poland, the United Arab Emirates, Italy and others. The most common forms of exploitation were in the sex industry (596) and labour exploitation. (319)[13].

Victims of human trafficking, their relatives or friends also approach the La Strada − Ukraine Centre, as do victims of domestic or other forms of violence. In 2006 **199** people were provided with social assistance (135 women and 64 men).

In terms of types of assistance, most often humanitarian aid was needed (basic necessities, clothing, medicine, food, etc) ((27%). We also provided consultations (21%); helped look for people who had disappeared abroad (12%), gave psychological assistance and support (10%), etc. in almost every case a person needs different types of assistance and the involvement of different structures.

THE WORK OF UKRAINIAN DIPLOMATIC INSTITUTIONS

As far as Ukrainian diplomatic offices abroad are concerned, the normative provisions for such embassy activity are adequate however the work is not happening. According to experts, the attitude people have to embassies and their lack of confidence that they will get any assistance needs to change. There need to be at least two people in each embassy who deal with this area, and their powers should be broadened, especially as regards repatriation and making this possible. There must also be coordination of activities between representatives of Ukrainian foreign representations and law enforcement agencies in a given country. The Ukrainian foreign representations should hold leaflets and information with addresses, telephone numbers, and a list of the services that nongovernmental and international organizations both in the other country and in Ukraine can provide to help. This will help Ukrainian nationals know who to turn to, and the embassy personnel to know where to refer them. To achieve this, mechanisms for cooperation between embassy and consulate staff on the one hand, and nongovernmental organizations on the other need to be established. These NGOs carry out a huge range of types of work on trafficking prevention and helping victims and are de factor important players in implementing policy, yet they are often treated in a superior

[13] IOM figures as of 31.12.2006, www.iom.org.ua.

manner and as secondary parties in the process. Relations and cooperation between government and nongovernmental organization are generally based on personal contacts and are not backed up by the relevant legal provisions.

We thus see that within the country, despite there being the necessary legal provisions, the administrative and organizational level of work in combating human trafficking is suffering. There is virtually no coordination of the work of various government institutions and nongovernmental and international organizations. There are problems in Internal Affairs bodies with poor staffing and material and financial resources, and changes are needed in MIA and State governance. One of the steps in overcoming such problems would be to draft and adopt a comprehensive anti-trafficking law. The opportunities and importance of such work has on many occasions been the subject of discussion at various conferences and many experts have supported such a law. The work has, however, not moved beyond words.

UKRAINE'S INTERNATIONAL LEGAL COOPERATION ON COMBATING HUMAN TRAFFICKING

In 2005 Ukraine signed the European Convention on Action against Trafficking in Human Beings however by the end of 2006 this had still not been ratified. One reason for this was the fact that ratification of the Convention will require substantial review of Ukrainian legislation since the Convention envisages, among other things, the imposition of criminal and administrative liability for legal entities.

This approach is not presently used in the Ukrainian legal system. For example, according to current legislation, in particular criminal, the perpetrator of a crime is a physical legal accountable person who committed the offence at an age at which, according to the Criminal Code, he or she bears criminal liability. This means that only physical persons can be perpetrators of a crime, and not legal entities. In the case of criminal acts committed within the work of a legal entity, liability is held by the individual who actually committed these acts. Ukrainian legislators may not, therefore, impose criminal liability on a legal entity for human trafficking or concomitant crimes since this runs counter to Ukrainian criminal law principles. These principles were, admittedly, formulated back in Soviet times and they fail to meet modern demands.

Administrative liability for human trafficking elicits ambivalent opinions since current administrative legislation in Ukraine does not provide a general definition for perpetrator of an administrative offence and does not even use such a term. In the Code of Administrative Offences [CAO] the term «osoba» [«person»] is used, without clear indication as to whether a physical person is meant or a legal entity [yurydychna osoba]. Outside the framework of the CAO there is a fairly large number of norms which impose liability on legal entities for committing unlawful behaviour. Although such actions have not been added by the legislators to the list of administrative offences, and liability for them is not titled administrative, they have many features in common.

The Convention ratification documents are with the Ministry of Justice and have yet to be submitted for review to the Verkhovna Rada.

The Council of Europe's Convention follows to a large extent the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime however it takes into consideration specific features of its region and refines some provisions.

The sphere of the Convention's application, for example is broadened with it covering all forms of human trafficking, national or international, whether or not linked with organized crime. It initiates a mechanism for identifying victims of human trafficking, has provisions on the need to criminalize the use of services of a victim of human trafficking and conduct relating to travel or identity documents, and sets down provisions on coordinating efforts in combating human trafficking and preparing a mechanism for monitoring implementation of the Convention.

Among other important documents we would mention the process of preparation for ratification of the European Convention on the Legal Status of Migrant Workers. Its ratification will end the final cycle towards Ukraine becoming a Contracting Party. This will in turn make it possible at the legislative level to fix human rights guarantees for Ukrainian nationals abroad and will help to resolve problems linked with labour migration.

During 2006 Ukraine signed the following international agreements which have bearing on the issue of human trafficking:

♦ Memorandum on cooperation between the Prosecutor General of Ukraine and the Prosecutor General of the Federal Republic of Brazil on fighting trans-national crime;

♦ Protocol between the Administration of the State Border Guard Service of Ukraine and the Border Guard Service of the Republic of Moldova on exchange of information from 21.11.2006;

♦ Agreement between the Cabinet of Ministers of Ukraine and the Government of Denmark on technical and financial cooperation from 09.11.2006;

♦ Protocol on introducing amendments to the Administrative Accord on applying the Agreement between Ukraine and the Czech Republic on social provisions, from 19.10.2006;

♦ Agreement between the Cabinet of Ministers of Ukraine and the Government of the Republic of Bulgaria on cooperation with regard to border issues from 25.09.2006;

♦ Memorandum on cooperation between the Prosecutor General of Ukraine and the Prosecutor General of Montenegro on combating trans-national crime and laundering of the proceeds of criminal activity, from 21.08.2006;

♦ Protocol between the Cabinet of Ministers of Ukraine and the Government of Romania on introducing amendments and additions to the Agreement between the Cabinet of Ministers of Ukraine and the Government of Romania on conditions for bilateral travel, signed in Kyiv on 19.12.2003 from 04.07.2006;

♦ Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on procedure for crossing the State border between Ukraine and Russia by residents of border districts of Ukraine and the Russian Federation;

♦ Protocol No. 2 to the Memorandum of mutual understanding between the Government of Ukraine and the Government of the United States of America on assistance in law enforcement issues from 20.03.2006;

♦ Memorandum on cooperation between the Prosecutor General of Ukraine and the Prosecutor General of the Republic of Serbia on combating trans-national crime and laundering of the proceeds of criminal activity, from 01.03.2006;

♦ Memorandum of mutual understanding between the State Committee of Ukraine on Financial Monitoring and the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) on cooperation in combating the legalization (laundering) of the proceeds of criminal activity and financing of terrorism from 24.02.2006;

♦ The Ministry of Internal Affairs took part in drawing up and signing a decision of the council of CIS member states on creating a database of people who have committee human trafficking offences;

♦ On 25 November 2005 an Agreement was signed in Moscow on cooperation between the members states of the CIS in combating trafficking in human beings, human organs or human tissue. The agreement was signed by Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Russia, Tajikistan and Ukraine and came into force in 2006.

♦ On 27 November 2006 Agreements were initialled in Helsinki with the European Union on readmission and liberalization of visa requirements. The agreements are scheduled to be signed on 18 June 2007 at the EU-Ukraine summit. The agreement on liberalization of visa requirements will come into effect after being ratified by the countries' parliaments. The document envisages that decisions on whether or not to issue a visa will be taken within 10 days and a reduction in the number of documents needed. In addition, the agreement allows for liberalized criteria in issuing multiple entry visas for many groups of people, for example, close relatives of EU citizens, lorry drivers, businesspeople, students, journalists and members of official delegations.

As of the end of 2006 the Ukrainian government had concluded bilateral work agreements with the governments of Armenia, Azerbaijan, Belarus, Latvia, Libya, Lithuania, Moldova, Poland, Portugal, the Russian Federation, Slovakia and Vietnam. It should, however, be noted that the agreements are of a purely declarative nature since applications are not presented from the foreign statements regarding workers (they need to specify the number, specialization, etc). furthermore, some of these countries (for example, Belarus, Moldova and the Russian Federation) have problems

similar to those in Ukraine – a high level of unemployment and poorly developed economy which places in question the need for Ukrainian workers on their territory. However in this direction, the efforts of the Ukrainian side encounter certain resistance from foreign partners.

PROGRAMMES OF INTERNATIONAL AND CIVIC ORGANIZATIONS

Ukraine continues to work with international organizations and other governments in the area of international technical assistance in combating human trafficking. In this sphere the following organizations are actively working in Ukraine: the International Organization for Migration, the ILO International Programme for the Elimination of Child Labour, the International Women's Human Rights Centre La Strada – Ukraine, the Organization for Security and Cooperation in Europe and the British Council. Assistance in implementing programmes are also provided by democratic countries such as Canada, Finland, France, Greece, Italy, the Netherlands, Norway, Sweden, Switzerland, the USA and others, both through their diplomatic missions, and via civic and international organizations. We name here some of the programmes carried out in 2006.

1. The La Strada – Ukraine Centre, together with the OSCE Project Co-ordinator in Ukraine and the IOM Mission in Ukraine, were designated national partners for implementing the Danish Programme against Human Trafficking in the countries of Eastern and South-Eastern Europe for 2006-2008 which is supported by the Danish Ministry of Foreign Affairs; «*Reinforcing the efforts of governmental and civic organizations in response to the increasing need to prevent human trafficking*» and «*Reinforcing action on preventing human trafficking*» with the support of the Finnish Embassy in Ukraine (July 2006 – May 2007) and the Norwegian Church Organization (August – December 2006). As part of these projects, the following received support: a group of educators; a National help line on human trafficking issues; preparation and publication of information and handbook material.

2. Another programme: «*Capacity building of local action committees on prevent trafficking in children, involvement of the committees in monitoring child labour and promoting reintegration of victims of human trafficking in two pilot regions of Ukraine – the Donetsk and Kherson regions*» (November 2005 – December 2006). The project had the support of the International Programme for the Elimination of Child Labour and was aimed at creating a system for monitoring child labour and implementing this at both regional and national level.

3. «*Development of a national system for assisting child victims of human trafficking and sexual exploitation*» (January 2005 – August 2006), supported by the Italian Ministry of Foreign Affairs, the International Organization for the Eradication of Commercial Sexual Exploitation of Children (ECPAT), the UN Interregional Crime and Justice Research Institute (UNICRI). This project is made up of many parts including the analysis of current legislation, preparation of a team of trainers, development of a training course, running multidisciplinary roundtables and training seminars in Ukrainians regions, etc.

4. A joint project on combating human trafficking in countries of South Eastern and Eastern Europe with the support of the KEPAD Organization (Greece) involving preparing a study on the human trafficking situation and existing legislation in the countries taking part in the project («Ariadna» Network)..

5.»*Support for combating human trafficking*» – *the DOEN Foundations (Netherlands).*

6. «*Organizing social assistance for victims of human trafficking*» *(May – September 2006). The project was supported by the Swiss religious organization COM and was aimed at organizing and providing medical, psychological, legal, humanitarian and other forms of assistance to victims.*

More than 60 civic organizations in Ukraine provide assistance to victims of human trafficking, however they do not have adequate funding for their activities.

We should also mention the most important publications in 2006 aimed at disseminating information among various professional groups and training specialists for measures to prevent human trafficking. They included: the handbook «Preventing human trafficking and the exploitation of children» (in Ukrainian and Russian); a training video with the same title and also in Ukrainian and Russian; a workbook for school students «Know and defend your rights»; a handbook «Basis principles for countering child labour in Ukraine»; an information and analytical collection «Combating

human trafficking: the legislative acts of other countries»; the study «The problems experienced by children of labour migrants: an analysis»; «How to organize telephone help lines on preventing human trafficking»; a theoretical and practical publication «Combating trafficking in children and the commercial sexual exploitation of children (main provisions of international and domestic legislation») for specialists working to protect children's rights (Ukrainian and English); a handbook for running training seminars «Preventing trafficking in children and commercial sexual exploitation».

An important event was the Regional Forum of Nongovernmental Organizations «Prevention of human trafficking for safe migration. The role of nongovernmental organizations in exercising public control and providing assistance», which took place in Kyiv from 26-27 September 2006. This regional forum is an annual event organized by the international association «La Strada» to share experience, raise the level of expertise and develop joint strategies for the work of nongovernmental organizations in countries of origin, transit and destination. The forum was attended by 56 people from 29 countries, as well as 28 representatives of Ukrainian nongovernmental organizations and government structures. The participants signed a statement regarding the need for government bodies to consolidate efforts on combating human trafficking.

2006 also saw the involvement of renowned artists in preventive campaigns against human trafficking. For example, from 20 June to 31 August television channels broadcast 2 video clips with the well-known Ukrainian singer, winner of Eurovision 2004, Ruslana. The video clips were sponsored by the OSCE and addressed the issue of human trafficking. They gave the phone number for the National Help Line on preventing human trafficking. During the period when the clip was shown, the help line **8 800 500 22 50** received **1013** calls from people who had found out about it from the clip. The advertising campaign was run by the popular group Okean Elzy»

7. CONCLUSIONS AND RECOMMENDATIONS

There is still no law in Ukraine on social protection for Ukrainian nationals abroad. Norms in current legislation against swindlers are not applied enough. There is virtually no functioning system for protecting witnesses, nor is there any legal protection against arbitrary behaviour by the authorities, bureaucratic red tape and non-payment of wages. At the same time, it is extremely difficult to prove the crime of «human trafficking», and therefore to punish the perpetrators.

The failure to safeguard people's right to protection from crime is demonstrated by the following:

- Staff of MIA agencies lack skills for working on human trafficking cases;
- Insufficient attention is given to training MIA staff on behaviour and action needed in human trafficking situations (this applies both to initial training and to higher educational institutes).
- The responsibility for human trafficking situations is shifted onto the victims;
- There is no coordination between the work of different law enforcement agencies;
- Difficulties in the examination of such cases in court;
- Lack of sufficient information about the government's activities in this area;
- Insufficient legal information on human trafficking issues;

A major problem is the stigmatization of human trafficking victims in society.

Regarding assistance to victims of human trafficking, the following problems can be highlighted:

1. The government is failing to fulfil Ukraine's international commitments even as far as the minimum standards for assisting victims of trafficking are concerned.

2. It is effectively impossible to receive assistance, short- or long-term shelter where needed, medical or socio-psychological assistance. Some of the reasons for this are:

- the lack of an extended system of institutions for victims of trafficking;
- the possibility, pursuant to the Standard provision on centres of socio-psychological assistance approved by a Cabinet of Ministers Resolutions, of only providing assistance to people under 35 which is in breach of the Constitution, the Law «On prevention of violence in the family» and the principles of human rights protection. Refinement is needed not only of the Law «On prevention of violence in the family», but also of a whole range of other laws and normative legal documents;

- the lack of social housing and of the possibility to live separately;
- the need to have registration in order to get into a shelter (for example, in Kyiv). In Chernihiv we learned that there is no such requirement however when the shelters and centres are financed by the local authorities, prosecutor's offices, or Control and Audit Department can demand registration in order to get help. This also violates people's right to receive assistance, making this dependent on place (city, region) of residence and not on the needs of the person.

RECOMMENDATIONS

1) Ratify the European Convention on Action against Trafficking in Human Beings and introduce amendments to legislative acts bringing them into line with this Convention;

2) In order to step up anti-trafficking measures within Ukraine, introduce amendments to the Criminal Code, criminalizing the buying of sexual services from children and adults;

3) Development a system of compensation for victims of human trafficking;

4) In order to develop effective strategy on countering human trafficking, combine legal measures and law enforcement activities with measures aimed at prevention and coordination, as well as at helping victims;

5) Develop and introduce indicators for estimating the prevalence of human trafficking in the country and keep statistical records of victims;

6) Introduce amendments to the Criminal Code by imposing liability for using the services of children engaging in prostitution and for preparing for ones own use, storing and using child pornography;

7) Revive a nationwide coordinating structure on anti-trafficking measures;

8) Create the office of National Coordinator on combating human trafficking, taking into consideration the experience of countries which have already introduced such an institution;

9) Consolidate cooperation and coordination of the efforts of both the government and civic sector on human trafficking issues, at local, regional, national and international levels;

10) Revitalize the work of permanent regional commissions on prevention of human trafficking (at the regional level);

11) Prepare a mechanism for providing regular information to the public about measures taken by the government on combating human trafficking, as well as their results and their real impact on the situation;

12) Develop a national system for providing assistance to victims, involving the government and nongovernmental organizations both at local and national level in order to ensure proper identification and referral of victims and that they receive the help they need;

13) Establish and introduce a system for returning Ukrainian nationals from abroad at the State's expense;

14) Run awareness raising campaigns about human trafficking;

15) Support the work of help lines in order to warn potential migrants of the risks they may encounter going abroad;

16) Prepare criteria for identifying human trafficking victims in order to ensure they receive victim status;

17) Make changes to the procedure for questioning of a victim's and the latter's testimony in court by using videoed evidence;

18) Draw up and add to the curriculum for postgraduate studies of educational workers, personnel of social services and of the law enforcement agencies a special course on preventing ill-treatment, sexual exploitation of children, human trafficking and other forms of violence;

19) Run training courses, seminars and conferences on human trafficking issues for representatives of governmental and nongovernmental organizations, including for people working in the tourist industry;

20) Carry out sociological research to ascertain how aware the public are about human trafficking issues.

XXII. THE RIGHTS OF REFUGEES AND ASYLUM SEEKERS[1]

1. OVERVIEW

The annual reports Human Rights in Ukraine for both 2004 and 2005 pointed out that refugees and asylum seekers are among the most marginalized groups in Ukraine whose rights are most often violated. Unfortunately, no positive changes in this situation can be reported in 2006. Overall one can even speak of an increase in violations of refugees' and asylum seekers' rights.

Traditional routes controlled by an international mafia for illegal migrants, mainly from African and Asian countries heading towards Western Europe pass through Ukraine's territory. The expansion of the European Union up to Ukraine's border makes it the first country for international migration. Although Ukraine has traditionally always been a source country for migrants, its position as the «gate» between Europe and Asia, combined with its long, often unmarked borders and poor border control makes it increasingly attractive for people trying to illegally get to the EU.

Ukraine is presently experiencing pressure both on its eastern and western borders. The number of migrants and asylum-seekers trying to reach the EU from the East is rising. At the same time, ever more migrants and unsuccessful asylum-seekers are being returned to Ukraine from Poland, Slovakia and Hungary in accordance with bilateral readmission agreements. At the EU-Ukraine Summit in Helsinki on 27 October 2006 the completion was announced of negotiations on a Readmission Agreement between Ukraine and the EU. The entry into force of this Agreement has presently been delayed, however according to the agreed version Ukraine commits itself to readmit all illegal migrants which entered an EU country via Ukrainian territory. Given the lack of a fair system in Ukraine for granting refugee status, the enforcement of the readmission agreement will present a real danger that the fundamental principle of non-refoulement of asylum seekers returned to Ukraine under the readmission agreement may be violated. In parallel to this, Ukraine also signed a readmission agreement with Russia.

In the report prepared by the prominent human rights organization Human Rights Watch «Ukraine: On the Margins Rights Violations against Migrants and Asylum Seekers at the New Eastern Border of the European Union»[2], the Ukrainian authorities are sharply criticized for serious violations of the rights of asylum seekers and refugees; ill-treatment; the lack of fair procedure for designating refugee status; no legislative regulation for the status of asylum-seekers; corruption over granting refugee status; cases involving racism and discrimination against refugees, etc.

Despite difficulties and the extremely high likelihood that refugees' rights will be violated, Ukraine continues to attract organizers of illegal migration. Reasons for this include shortcomings in migration legislation and endemic corruption among law enforcement officers, public officials and border guards.

According to official statistics from the Ukrainian migration service, 1,959 applications for refugee status were received in 2006 from 2,075 people (the figures are explained by the law including underage members of the family in an adult's application). Only 55 applications were

[1] Prepared by the Coordinator of the Vinnytsa Human Rights Group Dmytro Groisman.
[2] Available on the Human Rights Watch site: http://hrw.org/reports/2005/ukraine1105.

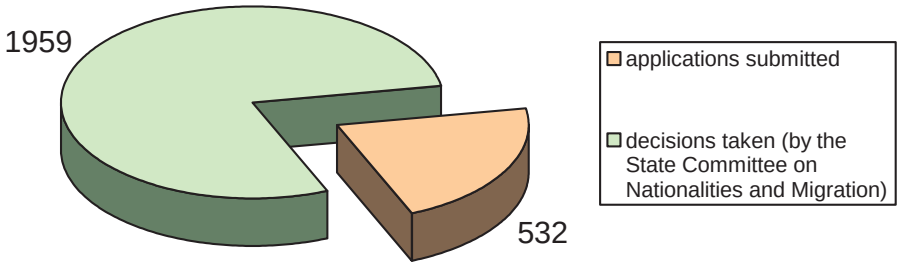
granted (according to unofficial data, the overall number of people who received refugee status, together with their children, came to 65). Among asylum seekers who received refugee status there were: 17 people from Afghanistan, 6 from Kazakhstan, 5 Iraqis, 4 Russian nationals (three being ethnic Chechens), 4 Uzbeks and 2 Belarusians. The overwhelming majority of asylum seekers were turned down at various stages of the review of their applications. For example, approximately one in ten did not even have his or her application for refugee status accepted while migration service offices refused to process the applications for refugee status of 57 percent of asylum seekers[3]. The rest were turned down after completion of official procedure at the level of the State Committee on Nationalities and Migration. Although the number of people granted refugee status in 2006 was up 30 percent on the figure for 2005 when 37 people received refugee status, in our opinion these statistics nonetheless reflect the unwillingness of the migration service to give objective consideration to asylum applications. They clearly demonstrate an intention to not grant refugee status to asylum seekers even where there are the grounds set down in international law.

At the beginning of 2006 the Vinnytsa regional migration service refused to process the applications for refugee status of two asylum seekers from Uzbekistan A. and B. The latter had left their country due to well-founded fears that they would face persecution over their participation in the crushing of a peaceful demonstration in Andijon on 13 May 2005 during which hundreds were killed. This decision was appealed in court and revoked as unlawful however that ruling from the first instance was later quashed by the Appeal Court. By March 2007 a final decision on the two applications had not been taken. It is indicative that in refusing to process documents for refugee status, the Vinnytsa regional migration service pointed to the fact that the two applicants had arrived on Ukrainian territory from the Russian Federation which they deemed to be a safe third country. This is despite the fact that even according to Ukraine's Law on Refugees having been in a safe third country does not constitute grounds for refusing to initiate the application procedure for refugee status.

Overall in 2006 (as of 1 January 2007) the statistics for asylum applications were as follows:

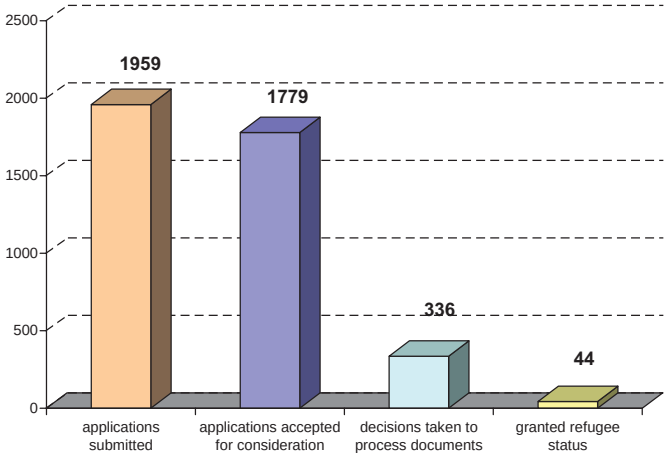
- applications submitted – 1959
- applications accepted for consideration – 1779
- applications not accepted for consideration – 180
- decisions taken to process the application – 336
- refusal to process the application – 1237
- refugee status granted – 44
- applications for refugee status turned down – 488

Results of the application procedure for refugee status in Ukraine in 2006 (as of 1.01.2007)

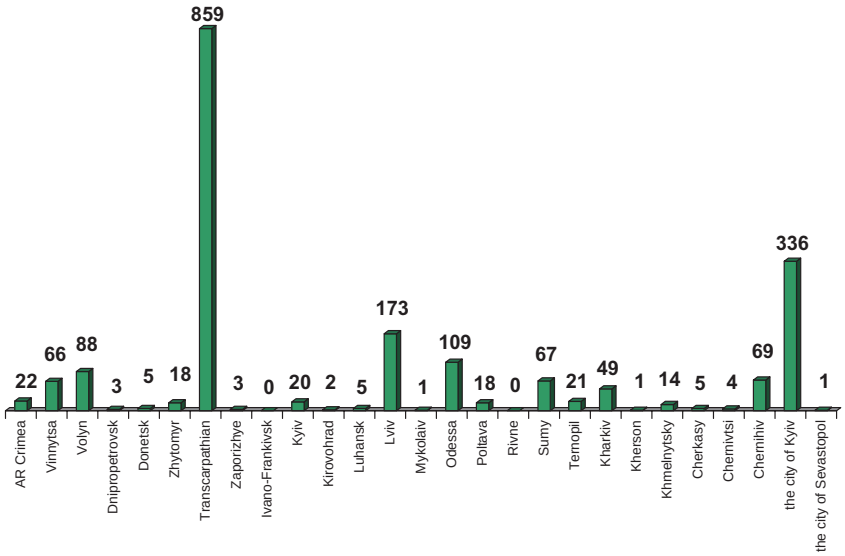


[3] Migration service bodies are empowered to i) accept applications for refugee status; ii) decide whether to process applications for refugee status and iii) consider whether refugee status should be granted. (The Law on Refugees, Article 7, p. 1, 4 and 5) The difference between the first two stages can seem somewhat elusive. Following an interview with an applicant, the application can be «accepted» however then, (theoretically following closer scrutiny) the migration service body can decide to refuse to process the documents. It is only after the first two stages have been passed, that the third commences, namely the review of a person's case with a decision to grant or refuse to grant asylum. (*translator*)

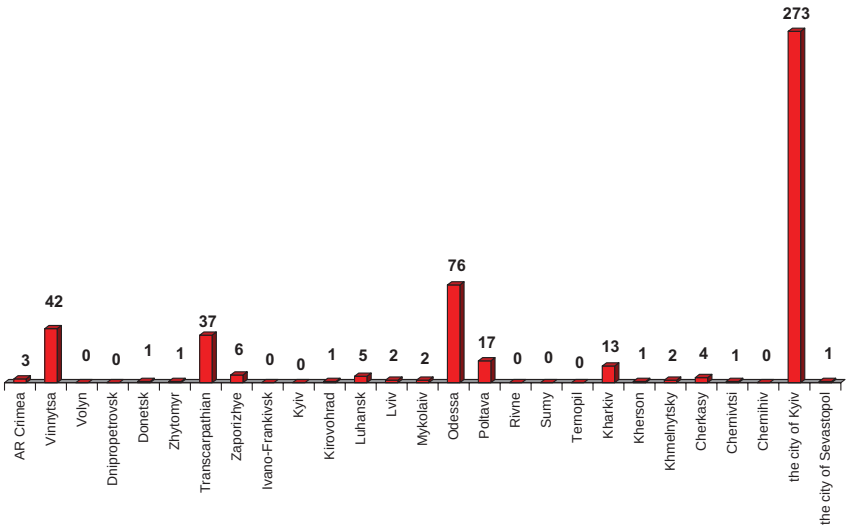
Results of the application procedure for refugee status in Ukraine in 2006 (as of 1.01.2007)



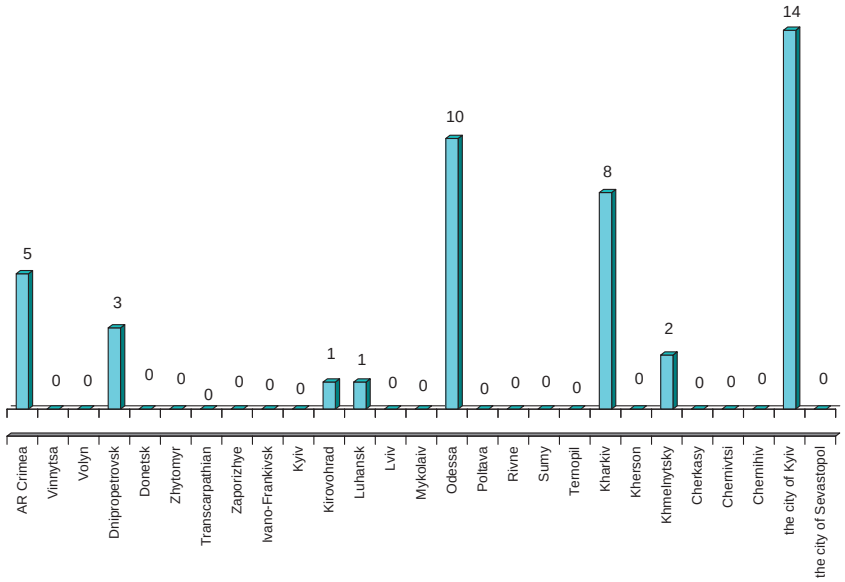
The number of applications for refugee status in Ukraine in 2006 by region, as of 1.01.2007 (in total 1959)



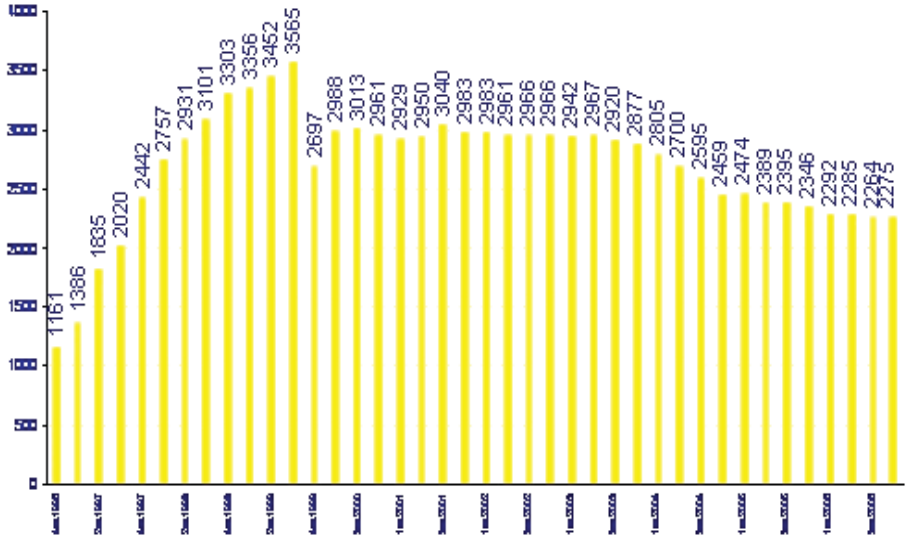
Application for refugee status turned down in 2006 by region, as of 1.01.2007 (according to figures from the State migration service – in total 488)



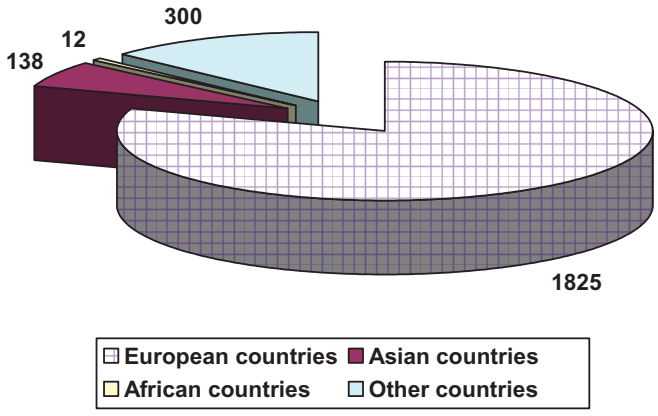
Granted refugee status in 2006 by region, as of 1.01.2007
(according to figures from the State Migration Service – in total 44)



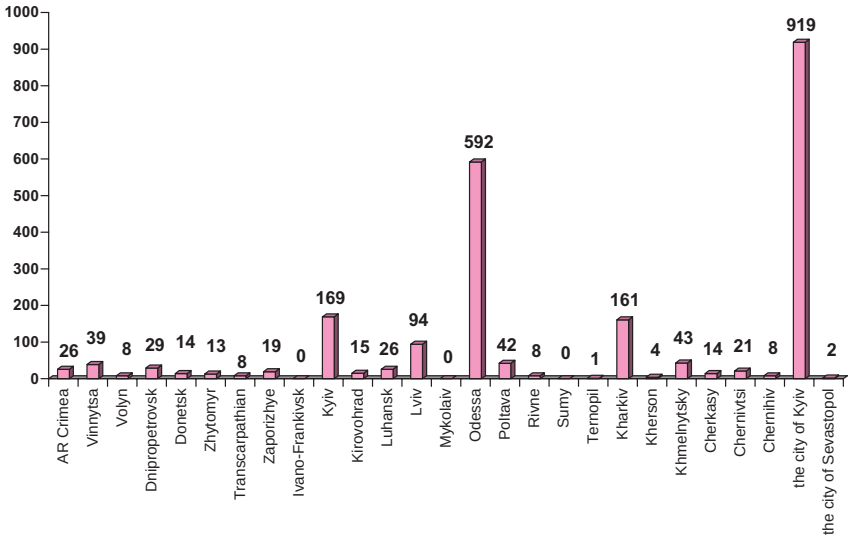
The number of refugees in Ukraine (over the last decade)



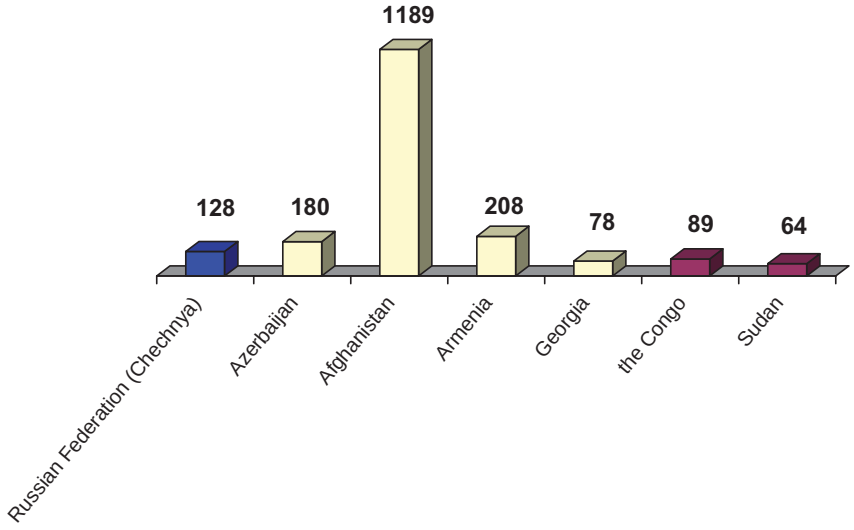
Refugee status applicants according to country of origin as of 1.01.2007



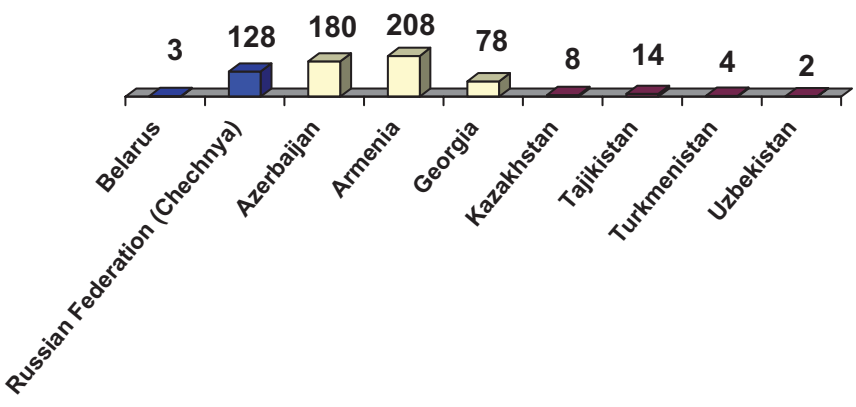
Refugee status applicants by regions as of 1.01.2007



Country of origin of the majority of refugee status applicants as of 1.01.2007



Refugee status applicants from CIS countries as of 1.01.2007



2006 saw yet another year of unsystematic and incomprehensible «reform» of the State Migration Service. During the entire year attempts continued to either place the migration service under the management of the Ministry of Justice or the control of the Ministry of Internal Affairs (MIA), or to separate it entirely and raise it to the level of a ministry.

Despite its duty by law to defend the rights of refugees and asylum seekers, the State Committee on Nationalities and Migration, headed in 2006 by Serhiy Rudyk, effectively turned into an outpost of the battle against refugees. It can be said that as yet there has been no success in creating a just system for determining refugee status in Ukraine and the migration service headed by the central specially empowered State Committee on Nationalities and Migration is not able to efficiently and fairly consider applications from asylum seekers.

Throughout 2006, rather than carry out their official duties, the highest public officials of the State Committee on Nationalities and Migration occupied themselves with mutual recriminations and cheap intrigues. The management of the State Committee also publicly demonstrated arrogance, contempt and a discriminatory attitude towards refugees and asylum seekers.

FROM AN OPEN LETTER BY THE DEPUTY HEAD OF THE STATE COMMITTEE ON NATIONALITIES AND MIGRATION OF UKRAINE VIKTOR VORONIN TO THE SBU [SECURITY SERVICE], THE MIA AND PROSECUTOR GENERAL[4]:

> «The vast majority of asylum seekers come from regions which are dangerous from the point of view of terrorist activities or drug trafficking. These include Afghanistan, Iraq, Chechnya, Tajikistan, Nigeria, Palestine, Sierra–Leone, and so forth. There are among them, albeit an absolute minority, members of international terrorist organizations and of drug cartels, which the law enforcement agencies are aware of. … One can only guess at what such people may be up to during the extra months granted them by the State Committee on Nationalities and Migration – plans to destroy the Kyiv reservoir, a bacteriological attack, bombing the embassies of the US or European countries, seizure of hostages in Russia, arranging drug trafficking with heroin to the EU or its sale in Ukraine.».
>
> I am alleging falsification by officials of documents and refugee files. What is behind this, is it Mr Rudyk's general lack of professionalism? I am not making a statement as to whether there really are corrupt motives – his or another Committee member's, that's a matter for the investigation department. I would merely stress that such falsifications are simply impossible without the knowledge of the higher management of the State Committee on Nationalities and Migration. Why have I spoken out now? That's very simple: on Thursday I signed a report on those cases I was aware of – no response. On Friday I wrote a second such report and said that there was a great risk that official documentation was being falsified. There was no reaction. I am left with no other option but to approach the law enforcement agencies.

It is telling that, in spite of the public promise by the then Minister of Justice Serhiy Holovaty to investigate cases which Voronin alleged in May 2006 of falsification by employees of the State Committee on Nationalities and Migration of asylum seekers' cases, the public were never told of the results of such an investigation.

Just at the end of 2006 there was another reform of the migration service which resulted, finally, in each Ukrainian region receiving its own subdivision. However the staff of the regional offices of the migration service is made up largely of former officers of law enforcement agencies who have a biased attitude to asylum seekers, seeing them as a threat to Ukrainian society. There is no system for regular professional development of the staff of regional migration services.

On 8 November 2006 Cabinet of Ministers Resolution No. 1575 reorganized the State Committee on Nationalities and Migration into the State Committee of Ukraine on Nationalities and Religion. Most of the management of the former State Committee on Nationalities and Migration were dismissed, and H.D. Popov became the acting Head of the newly formed Committee.

At present steps towards reforming the Ukrainian migration service remain unclear.

[4] See : http://proua.com/speech/2006/05/30/164027.html http://www.unian.net/ukr/news/news-156007.html

2. LEGISLATIVE REGULATION

In the annual human rights organizations' report «*Human Rights in Ukraine – 2005*»[5], a detailed analysis was given of legal regulation for safeguarding the rights of refugees and asylum seekers, and the problems arising in relation to this. No significant changes were made during 2006 to the legislation regulating the status of refugees and asylum seekers.

There are a considerable number of contradictory legislative acts of different levels in Ukraine which regulate the legal status of foreigners, including the status of asylum seekers. Some of this legislation, in particular subordinate legislation, for example some Orders, Instructions or Resolutions of Ministry of Internal Affairs agencies, the State Border Guard Service and the migration service, runs counter not only to the Constitution and laws of Ukraine, but to the country's international agreements in the field of human rights. Despite such lack of compliance, these legislative acts continue to be actively applied which leads to wide-scale infringements of human rights.

Legislation on refugees in Ukraine is mainly found in the Constitution of Ukraine, international agreements to which Ukraine is a signatory and the Law of Ukraine «On refugees».

At the constitutional level it is stipulated that *«Foreigners and stateless persons may be granted **asylum** by the procedure established by law»* (Article 26), however there is at present no Law of Ukraine «On asylum»[6]. Ukraine is a signatory to a whole range of international agreements which establish its commitments as far as protecting the rights of refugees and asylum seekers are concerned, in particular the: UN Convention relating to the Status of Refugees of 1951, which Ukraine ratified in 2002, and the 1967 Protocol to this Convention..

. Regulation of the procedure for the granting, loss or withdrawal of refugee status, as well as legal and social guarantees for refugees and asylum seekers are set out in provisions of the Law of Ukraine «On refugees». The first version of this Law was adopted by the Verkhovna Rada of Ukraine in 1993 after an extremely large influx of refugees from the military conflict zone in the Transdniestr region of the Republic of Moldova. The second version, adopted in 2001, with minor amendments introduced in 2005, remains in force at the present time.

An analysis of the provisions of the Law «On refugees», together with the amendments and additions introduced in 2005, makes it possible to conclude that the law does on the whole comply with international standards for protecting the rights of refugees and asylum seekers. The Law does however retain many norms which hamper the provision of international protection to refugees and asylum seekers, and which at times make a just procedure for establishing refugee status impossible. The procedure for obtaining refugee status in Ukraine remains extremely complicated, involving many levels.

Laws «On asylum» and «On the fundamental principles of Ukraine's migration policy» have still not been passed. Nor is there any systematic analysis or forecasting of migrant and asylum seeker movement, nor any organized work on gathering and analysing information concerning the countries of origin of refugees. This all leads to unjust decisions being taken to turn down applications by asylum seekers at the various stages of the procedure.

3. SPECIFIC ISSUES REGARDING REFUGEE AND ASYLUM SEEKERS' RIGHTS

Pursuant to Article 9 § 7 of the Law «On refugees», migration service offices determine whether to accept applications for refugee status. A refusal to do so is possible at this stage already after a quick and cursory consideration of the application on the basis of a whole range of formalities in no way connected with whether a person really is a refugee according to the definition of the Law and the UN Convention.

[5] The Report is available on the sites: www.helsinki.org.ua and www.khpg.org.ua

[6] The meaning here of the Ukrainian притулок – prytulok, is probably rather broader than the modern use of the word «asylum»., encompassing the general understanding of refuge, a place to stay. Presumably, what would be included in such a law would be provisions for people who may not receive refugee status, but cannot, for example, be sent back to a country with the death penalty, etc. I have avoided in many places using the customary English «apply for asylum» in order to retain the distinction drawn by the author. (*translator*)

A particularly serious problem remains in the failure to provide appropriate identification documents for asylum seekers at various stages of the procedure for seeking refugee status.

The Law «On refugees» defines several forms of passport-type documents which are issued to asylum seekers during the procedure for receiving refugee status. These are the so-called «identity papers» containing a photograph, basic biometric information about the person, which are issued by the bodies of the State Migration Service, confirm the identity of the applicant and are valid on the entire territory of Ukraine. However in cases where an individual is turned down at any stage of the procedure for receiving refugee status, these identity papers are immediately removed, and instead of them a person is issued with documents which are not valid as identification documents, do not contact a photograph or biometric details and do not enable a person to register at the place where s/he is living or staying.

In 2006 the State Committee on Nationalities and Migration failed to make any amendments to the notorious Order No. 20 which approved the «Temporary instruction on processing documents on the granting, loss or withdrawal of refugee status». It is this document which contains the discriminatory form «Notification of rejection» of an application for refugee status according to which people who have had their applications turned down remain for the period established by law for making an appeal without any document or identity papers.

The State has in this way created a situation whereby people who are still in the country legally since the refusal to proceed with their refugee status application may be appealed at an administrative level or through the courts within the legal time frame, are deprived of identification papers. This subjects them on an everyday basis to cruel harassment, demands for bribes and other illegal actions by those who wield official authority over them. The lack of identity documents carrying a photograph sometimes prevents an asylum seeker from receiving legal aid (aside from an expensive lawyer) since without a passport-type document notaries cannot certify instructions or other civil – legal acts. State officials are well aware of this problem which would, moreover, be possible to resolve without changing the law. The will of the State Committee for Nationalities and Immigration of Ukraine would suffice, however it is this will which is lacking since, in our view, the migration service officials at all levels, together with the MIA agencies responsible for registering citizenship and individuals, have a strong interest in maintaining the status quo, this being a situation in which refugees and asylum seekers are insecure, vulnerable and deprived of their rights.

FROM AN INTERVIEW GIVEN BY ASYLUM SEEKER H. FROM SOMALIA TO THE VINNYTSA HUMAN RIGHTS GROUP

Every morning I wait for the police to come. Sometimes they're there already at seven o'clock. They begin sneering at my document – the document (Notification of rejection of the refugee status application) there's no place for a photo, nor for a registration stamp. «Why haven't you appealed to the court against being turned down?», they ask.

I say that I have a year to apply to the court and that lawyers are working on my case. «We've had enough of you here!» the police say and laugh. We're taking you to court. In the Leninsky District Court in Vinnytsa our cases are normally examined by Judge Saulyak. He doesn't even look at us. First he calls the police to his office and talks about something with them, laughs, and then we go in. He quickly reads out a protocol, I don't understand much and the interpreter doesn't have time to translate. The judge doesn't even ask me if I consider myself to be guilty. He tells us all to leave. 10 minutes late they call us into his office, and the judge informs me that I am being fined 340 UAH because I am supposedly «in Ukraine illegally». The judge says «You see, I haven't deported you» and laughs. You can't appeal against such a court ruling. The police tell me in the corridor that they can come to my home every day! They say «think!» I think about the harassment and degradation I suffered from the armed bandits in my country. They came and threatened me with weapons because I'm from a minority clan. They also said «WE'VE HAD ENOUGH OF YOU HERE». Strange, but the bandits in Somalia also call themselves the «police».

Even having received one of the four identity documents which the law establishes should be issued to asylum seekers for the period during which their applications for refugee status are being reviewed, an asylum seeker remains vulnerable and without rights.

The papers need to be regularly renewed by the migration service with an appropriate stamp being added. In almost every region of Ukraine the local migration services demand that the asylum seekers reregister at their address with the police after each such extension of the papers. Although court rulings in both the Vinnytsa and Mykolaiv regions have found such demands to reregister with the police unlawful[7], all migration service offices stubbornly continue the practice. The amount of State duty which is payable for the registration of asylum seekers is not directly stated in any law or Decree, as a result of which in various regions of Ukraine the police demand arbitrarily imposed amounts of state duty for registration. Human rights defenders, as well as the UNHCR, have for years been pointing to this problem. It would seem however that the MIA has no intention of providing passport service offices in the regions with any guidelines on this issue.

During the procedure for granting refugee status the migration services are regularly guilty of flagrantly infringing the regulations in the Law «On refugees» with regard to child asylum seekers. This problem became especially acute in 2006. Article 12 of the said Law stipulates that «The personal interview with a child separated from his or her parents shall be conducted in the presence of the child's lawful representative who submitted the application for refugee status on behalf of the child, a psychologist or educational worker». In fact, however, the migration services very often ignore this crucial requirement and do not approach care and guardianship bodies asking that somebody look after child asylum seekers separated from their parents. As a result, throughout the entire refugee status procedure, these children do not have legal representatives, making the whole procedure for determining their status unlawful and unjust and leading to grave violations of their rights. In 2006 the State Committee for Nationalities and Immigration on repeated occasions unlawfully turned down applications for refugee status from children separated from their parents on the grounds that they had come from a safe third country, this being in direct contravention of the law. This indicates the arrogant and cynical manner in which migration officials ignore the fundament international principles on protecting refugees' rights.

In 2006 migration service offices and mainly the State Committee for Nationalities and Immigration seriously violated the Law «On refugees» in not adhering to time limits established for review of asylum seekers' applications and for giving a final decision as to whether to grant refugee status.

As of 15 June 2006, in contravention of the law, the State Committee for Nationalities and Immigration had not taken decisions in more than 130 cases involving foreign nationals whose applications had been submitted more than three months earlier. As a result, applications were not able to receive refugee status during the legally established time frame or appeal against a refusal to grant it. This violated their right of movement, free choice of place of residence, freedom to leave Ukraine, to seek employment or take part in any other work activities on the basis and according to the rules of procedure established for citizens of Ukraine, etc.[8]

On Ukraine's western border asylum seekers are held in the detention centre for illegal migrants in Pavshino, Transcarpathian region. This closed regime centre is maintained by the State Border Guard Service and sometimes holds up to several hundred people, both economic migrants and asylum seekers. Although formally representatives of two nongovernmental charities providing legal and humanitarian aid have access to the Centre, in practice almost all issues regarding communication between lawyers and detainees depend on the centre's administration. The Vinnytsa Human Rights Group has on a number of occasions received complaints from people being held at Pavshino alleging that guards demand money from them and use physical force against them. Some

[7] See the Decision of the Leninsky District Court in Vinnytsa in the administrative jurisdiction case № 2a-335-06 from 8 June 2006 and the Decision of the Mykolaiv region Voznesensky City District Court in the administrative jurisdiction case № 2a-126-06 from 12 July 2006

[8] From an Instruction of the Deputy Prosecutor General of Ukraine T.K. Kornyakova to the Head of the State Department for National Minorities and Migration S. Rudyk from 29 June 2006 № 07-НН-212

members of the charities allowed to carry out work in the Pavshino Centre have, on the basis of confidentiality, reported witnessing degrading or other ill-treatment of detainees by servicemen, but have avoided direct conflict with the Pavshino Centre administration fearing that this could result in their being refused access to the centre.

Other complaints from Pavshino detainees received on several occasions by the Vinnytsa Human Rights Group have alleged a discriminatory attitude towards people of certain nationalities with regard to access to application procedure for refugee status. People from Bangladesh, Sri Lanka and China, for example, have asserted that on various pretexts their applications for refugee status were not accepted, and when they did succeed in passing these applications to border guard officers, they did not then reach the Transcarpathian region migration service.

Migrants' rights are quite often violated when State Border Guard bodies arbitrarily and without giving reason refuse to allow foreign nationals onto Ukrainian territory. According to official statistics, in 2006 the State Border Guard refused entry into Ukraine of 18,173 people whom they deemed «potentially illegal migrants». Who are these people and who decides to classify them as «potentially illegal migrants»? How many of them are potential asylum seekers and how many of these are then returned to their country of origin with further violation of their rights? There is no official response to such questions.

The problem remains extremely serious of forced return (expulsion or deportation) of asylum seekers to their country of origin, with these effectively not being regulated by Ukrainian legislation. Extradition in Ukraine takes place without mandatory use of a court mechanism. Although even the possibility of judicial control over the justice and lawfulness of deportation remains extremely dubious since legislation does not stipulate the mandatory participation of lawyers in the extradition procedure.

Asylum seekers and refugees have also been deported which is a violation of Ukraine's international human rights commitments. At the point at which an asylum seeker has his/her legally envisaged official document removed [i.e. after the application has been turned down, yet while the person still has the right of appeal – translator], s/he automatically ends up in the same position as an illegal immigrant, and is often subjected to administrative deportation which may be against their will. With regard to deportation, on 1 September 2005 the Code of Administrative Justice of Ukraine came into force, and together with it, some amendments and additions were introduced to laws regulating the procedure for expelling aliens from Ukraine. Nevertheless the current administrative procedure for expulsion remains confused and places human rights in jeopardy.

The Code of Administrative Justice does not, for example, establish the periods in which expulsion takes place after a ruling is issued, does not make the presence of a defence lawyer (representative) obligatory, does not explicitly prohibit the sanctioning of extradition during court proceedings behind closed doors, and there are also no procedural guarantees for individuals who are awaiting enforcement of an expulsion order or a court review of an appeal against expulsion.

4. COURT DEFENCE OF ASYLUM SEEKERS AND REFUGEES

Decisions by regional migration services which can be contested in court fall into three main groups:

1. An appeal against the refusal to accept an application for refugee status. The grounds for such a refusal are set out in Article 12 of the Law «On refugees»., namely if the applicant is concealing his or her true identity, if s/he has previously been refused refugee status in the absence of the conditions foreseen by Article 1 § 2 of the Law and if these conditions have not changed.

2. Appeals against a refusal to process application documents for refugee status. The grounds are set out in the same Article 12: « Decisions on refusal to process documents for resolving the issue of granting refugee status shall be made in relation to applications which is manifestly un-

founded, i.e. when in relation to the applicant no conditions stipulated in paragraph 2 of article 1 of this Law exist, and when applications are associated with abuse, i.e. when applicant pretends to be some other person, and in relation to applications submitted by persons who were denied refugee status due to absence of conditions stipulated in paragraph 2 of article 1 of this Law, if such conditions did not change».

3. An appeal against other unlawful actions or inaction during the procedure for seeking refugee status.

The following decisions of the State Committee for Nationalities and Immigration can be appealed according to legally established procedure:

1. Where appeals against the refusal to accept an application for refugee status have been rejected;

2. Where appeals against the refusal to process an application for refugee status;

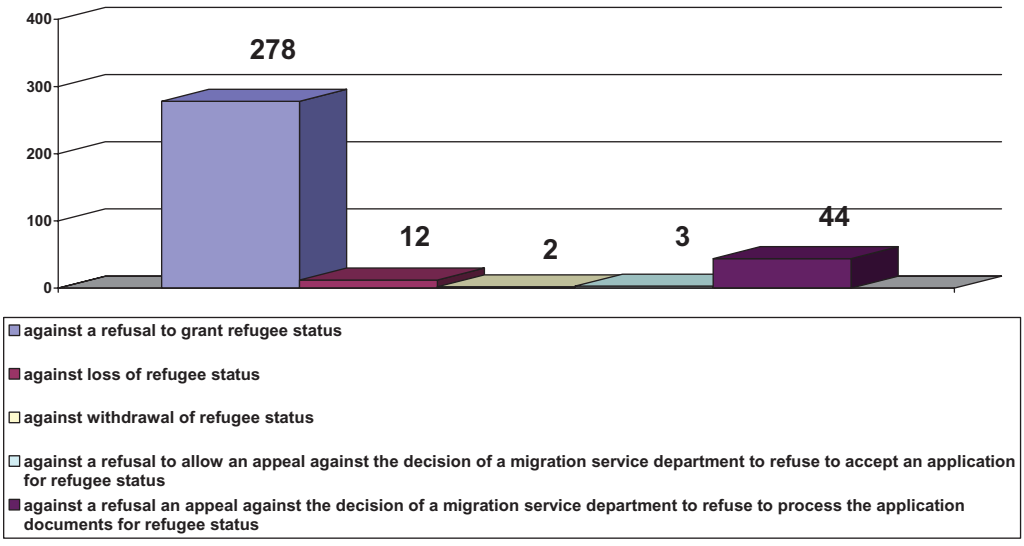
3. Against the granting, loss or withdrawal of refugee status.

The rules of procedure for court appeals against decisions issued by regional migration services or the State Committee for Nationalities and Immigration are established by the Code of Administrative Justice which came into effect on 1 September 2005. Article 17 of the Code states that administrative courts shall have the jurisdiction to decide on disputes between individuals or legal entities and the authorities appealing against the decisions of the latter (normative legal acts or legal acts of individual force), actions or inaction.

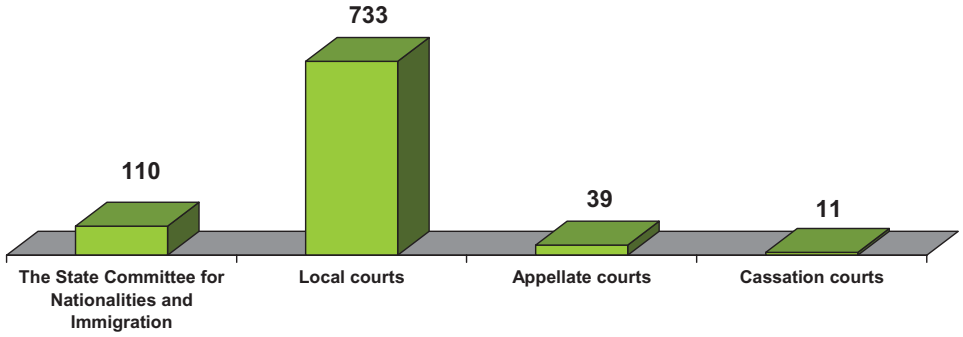
For example, a decision by the Lutsk City District Court from 04.05.2006 failed to consider an appeal against the Volyn Regional migration service for having refused to process a refugee status application. The court, in issuing the ruling, referred to Article 16 of the Law «On refugees» and asserted that the claimant had missed the seven-day deadline for appealing to the court. However the Volyn Regional Court of Appeal revoked this ruling, stating that in accordance with Article 99 of the Code of Administrative Justice an administrative claim could be submitted over the space of a year, counted from the day when the person discovered or should have found out about the infringement of his or her right.

In 2006 there was an increase in the number of appeals from asylum seekers to the court defending their violated rights. Official statistics from the State Committee for Nationalities and Immigration give the following statistics:

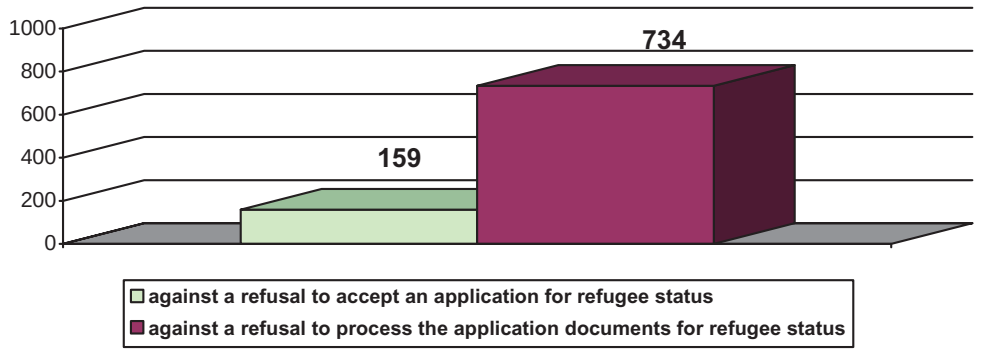
Appeals against decisions by the State Committee for Nationalities and Immigration in 2006, as of 1.01.2007



Appeals against decisions by migration service departments in 2006, as of 1.01.2007



Appeals against decisions by migration service departments in 2006, as of 1.01.2007



At present, since district administrative courts have not begun functioning, asylum seekers' first instance court cases are examined by local courts of general jurisdiction. At the end of 2006, the UNHCR, in cooperation with the High Administrative Court of Ukraine, ran the first training seminar for judges of local and appellate courts on court defence of refugees' rights.

Courts are often uneven in their application of the procedural norms of the Code of Administrative Justice in determining jurisdiction of administrative suits against the State Committee for Nationalities and Immigration. For example, Judge Korol from the Leninsky District Court in Vinnytsa twice unlawfully refused to consider administrative suits brought by asylum seekers according to where they were staying and suggested that they approach the district administrative court whose jurisdiction covers Kyiv. These rulings by Judge Korol were revoked by the Vinnytsa Regional Court of Appeal which did not prevent Judge Korol from issuing another such judgment at the beginning of 2007.

In July 2006 the Leninsky District Court in Vinnytsa (under Judge T. Salo) refused to allow a submission from the Head of the Vinnytsa Regional Department of the MIA to remand in custody Uzbek national M., who was wanted by the Uzbekistan authorities for his alleged part in the «Andijon events». The court based its decision on the fact that M. was in the process of applying for refugee status in Ukraine[9].

In autumn 2006 the Voznesensky City District Court for the Mykolaiv region allowed an administrative suit lodged by an asylum seeker from Pakistan Y. against the State Committee for Nationalities and Immigration. The refusal to grant the person refugee status was declared unlawful and revoked, and the State Committee for Nationalities and Immigration was ordered to pass a decision granting Y. refugee status.[10]

[9] Decision of the Leninsky District Court in Vinnytsa from 17 July 2006

[10] Decision of the Mykolaiv region Voznesensky City District Court in the administrative jurisdiction case № 2a-126-06 from 26.09.2006

Although the court decision was not appealed by the State Committee for Nationalities and Immigration and it entered into force, the administrative respondent refused to enforce the court ruling with regarding to granting refugee status. It proposed instead «*to reconsider Y's application for refugee status in Ukraine*». Later, despite the fact that the State Bailiffs' Service had launched writ proceedings over the court's decision, the Kherson Regional Prosecutor approached the Mykolaiv Regional Appeal Court with an appeal on behalf of the State against the Voznesensky Court. The arguments presented are so representative of the attitude of the prosecutor's office to human rights and the independence of the courts that they warrant being quoted in full.

«By ordering the State Committee for Nationalities and Immigration to grant refuges status, the court infringed Article 162 of the Code of Administrative Justice of Ukraine which does not authorize the court to demand that the respondent take certain decisions which are solely within the latter's competence.

The representation by the prosecutor's office in the given case has been prompted to lodge an appeal by the need to defend the interests of the State, the right of which to voluntarily take decisions on granted refugee status will be violated should the State Committee for Nationalities and Immigration adhere to the decision of the Voznesensky City District Court for the Mykolaiv region with regard to granting X refugee status».

5. THE ILLEGAL DEPORTATION OF UZBEK REFUGEES[11]

In February 2006 Ukraine defiantly violated its international human rights commitments by unlawfully and forcibly returning 11 asylum seekers to Uzbekistan.

Nine of the eleven had between 1 and 6 February 2006 officially applied to the migration service in the Crimea for refugee status and they had been issued with the appropriate documents confirming that they were on Ukrainian territory legally.

Yet only a few days after their applications for refugee status were lodged, on 7 February all the asylum seekers were detained in the course of a special operation by the Central Department of the Crimean SBU. They were held in an MIA centre for the reception and distribution of vagrants in the Crimea without access to legal assistance. After being detained, the other two Uzbek nationals also applied for refugee status.

On 13 February all of the 11 men were handed «Notification of the refusal to process their applications for refugee status». By 14 February they had been secretly taken to the Kyvsky District Court in Simferopol which ruled that all 11 be deported since they did not have legal grounds for being in Ukraine. The grounds for the arrest of the Uzbeks remain unclear as does the reason why, if this was an arrest of normal illegal immigrants as the law enforcement agencies tried to suggest, the Central Department of the SBU had been involved. The detained men allegedly gave written consent to being returned to Uzbekistan and a rejection in writing of their right of appeal against the court ruling. In fact, however, such written rejections are unlawful given that they contravene the Constitution and relevant procedural legislation.

They were taken by plane from Simferopol to Tashkent during the night between 14 and 15 February.

As we can see, the detention and deportation of the Uzbeks was carried out with numerous flagrant violations of Ukrainian legislation. The worst aspect is that these people really did face danger in Uzbekistan, and sending people to an unsafe country is a direct violation of Ukraine's international commitments under the UN Convention on the Status of Refugees, the UN Convention against Torture and Cruel Treatment and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[11] More information about this case can be found in the article «Only you are unfailing, betrayal...» by Yevhen Zakharov http://khpg.org/en/index.php?id=1142020420&w=betrayal and many other articles on the Kharkiv Human Rights Protection Group website
See also the OSCE Human Dimension Conference in October 2006 and material from the International «Memorial» Society «Refugees from Uzbekistan in CIS countries»: http://www.osce.org/conferences/hdim_2006.html?page=documents&session_id=62 (http://www.osce.org/item/21559.html?lc=RU).

Soon after the deportation, all the Uzbek nationals were arrested and most were sentenced to between 3 and 13 years imprisonment during court trials which did not meet international standards for just court proceedings. According to human rights organizations the Uzbek asylum seekers were subjected to torture and ill-treatment in their country of origin.

None of the attempts to justify their actions given by state bodies stand up to criticism.

PUBLIC STATEMENT FROM UKRAINIAN CIVIC ORGANIZATIONS ON THE EXTRADITION OF UZBEK ASYLUM SEEKERS

The extradition of the asylum seekers to Uzbekistan was a demonstration of flagrant disregard for international standards of the protection of refugees. The asylum seekers were deprived of legal assistance, access to employees of the UNHCR, and to any procedure in keeping with the standards of a just legal system. Such actions by the authorities testify to a cynical lack of respect for fundamental human rights, international commitments and also national law.

The government of the country which our regime handed those people over to has gained notoriety throughout the world through its use of concentration camps, the large number of political prisoners against whom the state applies torture, extra–judicial executions and the death penalty. The government of Uzbekistan is also know for its practice of brutally crushing any manifestations of free thinking, freedom of expression, freedom of religion and freedom of peaceful assemblies. The haste with which the Ukrainian authorities handed the refugees over to the Republic of Uzbekistan is not only a demonstration of political double standards in the field of human rights, but also shows the lack of humanity and simple sound judgement in taking decisions about people's lives.

The way in which the authorities behaved denigrates Ukraine to the level of countries for whose governments the value of human life is an empty phrase. Moreover, the information we presently have suggests that the extradition of the Uzbek asylum seekers was a planned special operation by the Security Service of Ukraine, the State Committee for Nationalities and Immigration of Ukraine, the Ministry of Internal Affairs and some other state executive bodies.

We consider that the direct responsibility for this flagrant violation of human rights lies with the heads of the state bodies named. However the responsibility also lies with the President of Ukraine who did not fulfil his constitutional duty to guarantee the observance of human rights and fundamental freedoms[12].

UNHCR APPALLED BY DEPORTATION OF UZBEK ASYLUM SEEKERS FROM UKRAINE

The UN refugee agency said it was appalled to discover that 11 asylum seekers from Uzbekistan had been forcibly deported back to their home country by the Ukrainian authorities on Tuesday night. Nine of the asylum seekers had earlier registered their asylum claims with the Ukrainian authorities and the other two had expressed their intention to also claim asylum.

«We deplore this action, which the authorities carried out in contravention of their international obligations», said Pirkko Kourula, Director of UNHCR's Bureau for Europe.

UNHCR is seeking urgent clarification from the Ukrainian authorities and seeking additional information about the fate of the deportees.

On Wednesday afternoon, UNHCR learned from media reports that the detained Uzbeks had been deported during the night of 14–15 February. The 11 men are now presumably in the custody of the Uzbek authorities.

Details of the situation are still emerging. On 7 February, UNHCR learned that 11 Uzbek asylum seekers had been arrested in two different locations in Crimea by unidentified Ukrainian law–enforcement authorities.

The Ukrainian authorities confirmed the asylum seekers had been taken to a detention facility in Simferopol after the authorities received requests for their extradition from the Prosecutor's Office of Uzbekistan, alleging involvement in the civilian protests in Andijan on 13 May 2005, which ended violently.

[12] Public statement from Ukrainian civic organizations on the extradition of Uzbek asylum seekers – the statement in full can be found at: http://khpg.org/en/index.php?id=1140540016&w=Uzbek+asylum

> As early as Tuesday, 7 February, and again on 14 February, UNHCR wrote to the Ukrainian authorities requesting official guarantees that no asylum–seeker would be forcibly returned unless they had been determined not to be a refugee, after going through full and fair asylum procedures, including the right to appeal. UNHCR also requested access to the detained Uzbeks.
>
> Being the subject of an extradition request does not remove an asylum seeker or refugee from international refugee protection. UNHCR reiterates the importance of the principle of non–refoulement, under which no refugee or asylum seeker whose case has not yet been properly assessed, can be forcibly returned to their country of origin. Refoulement is a violation of the 1951 UN Refugee Convention, to which Ukraine is a signatory, and is also contrary to international customary law.
>
> It is also a breach of the UN Convention against Torture to send persons back to countries where they may face torture.
>
> Refoulement is also specifically prohibited under Ukrainian national law.
>
> UNHCR is seeking assurances from Ukraine that in the future, asylum–seekers from any country will be treated in full respect of Ukraine's international and national legal obligations concerning refugees and asylum seekers.[13]

Only in May 2006 under pressure from the international community did the Ministry of Justice recognize that there had been an infringement of human rights in the deportation of the Uzbek asylum seekers.[14].

However other State bodies – the Ministry of Foreign Affairs[15], the SBU[16], the Ministry of Internal Affairs and the State Committee for Nationalities and Immigration[17], have continued in the worst traditions of Soviet propaganda to defend their actions, and those responsible for the shameful deportation of the Uzbek asylum seekers have not been punished.

It is also interesting that the SBU began trying to justify its actions by claiming that the 11 Uzbeks had been involved in terrorist activity. Besides the fact that such assertions were not backed by any evidence, they also clashed with the overall statistics for the year. For example, at the beginning of 2007 SBU spokesperson M. Ostapenko stated that during 2006 only two foreign nationals had been deported in connection with terrorist activities[18]. The given explanation by the SBU for the deportation of the Uzbeks is thus contradicted and is clearly untrue.

6. CONCLUSIONS AND RECOMMENDATIONS

With regard to the recommendations from human rights organizations for improving the system for protecting refugees' and asylum seekers' rights published in last year's report, the authorities only took into consideration a few of them. All those recommendations not heeded remain, in our opinion, valid for 2007.

Since Ukraine is failing to carry out its basic commitments regarding the protection of the rights of refugees, despite its having signed and ratified the UN Convention on the Status of Refugees and the Protocol to it, we consider that the migration bodies of State Parties to this Convention should not recognize Ukraine as a «safe country» for returning refugees and asylum seekers.

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[13] Official statement from the UNHCRO on 16 February 2006 http://unhcr.org.ua/news.php?in=1&news_id=77&lang=e

[14] See Letter № Б-8320-18 from the Deputy Minister of Justice D. Kotlyar from 3 May 2006 // http://khpg.org/en/index.php?id=1147114502&w=Uzbek+asylum .

[15] See the statement from the Ukrainian Ministry of Foreign Affairs to the annual OSCE Human Dimensions Conference in Warsaw (October 2006) (http://helsinki.org.ua/files/docs/1160824378.pdf) and UHHRU's response (http://www.osce.org/documents/html/pdftohtml/21313_en.pdf.html).

[16] See, for example, SBU letter from 26 August 2006 року № 5/2/2-15648 // http://community.livejournal.com/uzbek2006/22004.html#cutid1.

[17] See, for example, Letter from the State Committee for National Minorities and Immigration to Amnesty International, dated 25 December 2006 № 7/3-18-1384 // http://community.livejournal.com/uzbek2006/28917.html#cutid1.

[18] There are no terrorists in Ukraine! // MIGnews.com.ua: http://www.mignews.com.ua/categ186/articles/246402.html.

XXIII. PRISONERS' RIGHTS IN UKRAINE[1]

This section provides information on the functioning of the Ukrainian penal system in 2006, and discusses changes and events during the year. The main sources of information were responses from State institutions to formal requests for information from «Donetsk Memorial», as well as the results of our projects and research linked with those projects, material from seminars and conferences. We also used media, and Internet, reports and letters and appeals from individuals in penal institutions.

It is possible that some of the facts cited here might not find corroboration, and certain conclusions are subject to debate. We would ask for understanding given the constraints with time and resources which prevented the study being fuller and more substantial. We are convinced, however, that such an assessment of the work of the penal system in the country is needed and beneficial.

1. THE DEPARTMENT AND ITS SUBORDINATION

The State Department for the Execution of Sentences [hereafter the Department][2] has existed as an autonomous institution since 1998. The creation of a separate department was initially presented as a temporary stage in the implementation of Ukraine's commitments undertaken in 1995 on joining the Council of Europe.

One of these commitments, set down in Opinion No. 190 (95) and Resolution № 1466 (2005) of the Parliamentary Assembly of the Council of Europe, was to transfer the system for the execution of sentences to the Ministry of Justice. Ukraine was also to carry out measures aimed at reforming the system in order to safeguard human rights and ensure that the conditions of those convicted of a crime and prisoners were brought into line with European norms and standards.

Over time any attempts to fulfil the commitments Ukraine had undertaken and transfer the Department to the Ministry of Justice met with actual opposition from the Department management. The Department did not respond in any way to proposals put forward by civic society, in particular «Donetsk Memorial» and the Penitentiary Association of Ukraine, to hold public discussion and to consider both among specialists and with the involvement of the public the problems and expediency of such subordination. There is also no information regarding the use of measures or at least a discussion of measures aimed at preparing the Department for transfer to a civilian structure. This

[1] Prepared by Oleksandr Bukalov, Head of the civic organization «Donetsk Memorial», in cooperation with Yevhen Zakharov, Co-Chair KHPG and Head of the Board of UHHRU.

[2] Unfortunately, most of the terms used in this area are translated in various ways. As far as possible, for greater clarity and cross-referencing, we are endeavouring to keep with the most standard terms, or, if that not be possible, then with those used by the European Court of Human Rights. In this report we use the term Penal Code for Kryminalno-vykonavchy kodeks, however this is occasionally translated elsewhere as the Criminal Execution Code). The name of the Department given here is that used by the Council of Europe however it is often simply called the State Penal Department of Ukraine. The reason for adding the Ukrainian abbreviations and acronyms (ITT and SIZO) is to try to somehow minimize the difficulties. ITT stands for temporary holding facilities [ITT] while SIZO is the term used for pre-trial detention centres (also called investigative isolation wards and remand units) The problem with terms for SIZO is that for various reasons, many SIZO do in fact also hold convicted prisoners, although this is not their main function. (*translator*)

can only show that the real reasons for the efforts of the management to maintain the Department's autonomy are in no way linked with concern for efficient functioning.

At present the Council of Europe continues to remind Ukraine each year about its unfulfilled commitments with regard to the Department's status. This only serves to confirm that the assertions by the Department's management that it has honoured these commitments merely through being taken out of the Ministry of Internal Affairs structure are false.

In the middle of March 2007 an EU-Ukraine meeting was held in Strasbourg on management of the prison programme. During the session Ukrainian and Council of Europe experts analyzed the changes which had taken place in 2005 and 2006 in the Ukrainian penitentiary system. They heard the report prepared by the State Department for the Execution of Sentences on implementation of the 2005-2006 Action Plan on reforming the Ukrainian Penal System

Minister of Justice Oleksandr Lavrynovych reported that the Council of Europe experts expressed criticism of Ukraine's lack of analysis with regard to its implementation of CE recommendations on running the penitentiary system made during three monitoring visits to Ukraine.

The Minister added that the CE had also criticized the State Department for the Execution of Sentences for being tardy in providing proposals for the 2007-2008 Action Plan on reforming the Ukrainian Penitentiary System. It had been planned that the proposals would be presented and the Action Plan approved in Strasbourg. However since the information was not provided on time, the CE Secretariat had postponed this until May or June 2007.

2. REMAND AND CONVICTED PRISONERS IN PENAL INSTITUTIONS OF THE DEPARTMENT

Each year around 200 thousand people are sentenced for criminal offences in Ukraine. Of this figure, approximately 55 thousand, or around 27%, of the total number convicted receive terms of imprisonment.

According to figures from the State Department for the Execution of Sentences, the number of people held in its institutions decreased in 2006 by 10,198 or by 6%. The overall number as of 01.01.2007 came to 160,725 people held in 182 institutions. According to the Department's Report on its implementation of its action plan for the fourth quarter, of the number of people convicted of offences 125, 6 thousand were serving sentences in 136 penal institutions; 2.2 thousand minors in 11 juvenile educational colonies and 4.9 thousand people were serving terms of restricted liberty in corrective centres. These figures do not usually include the several hundred people who have had their freedom of movement restricted by a court. There are also convicted military servicemen serving their sentence in disciplinary brigades. Changes in the number of prisoners in Ukraine over recent years are presented in Table 1. It should be stressed that the rate at which the number of people behind bars in 2006 decreased was only half that for 2005.

In 2006 44,917 individuals were sent to corrective colonies (against 53,436 a year earlier). During the year 59,559 individuals were remanded in custody in SIZO [pre-trial detention centres]. At the same time in 2006, 49,667 people were released from imprisonment (against 63,502) of whom 30,761 were given early conditional release (against 32,923).

The generally accepted indicator of the number of prisoners per 100 thousand of the population comes to around 342 in Ukraine. For comparison, in Russia the figure is approximately 600, in the USA – more than 800, whereas in Western European countries the figure ranges from 80-120.

On 1 January 2007 there were 32,619 people remanded in custody in SIZO (as of 1 January 2006 the figure was 33,279). A more detailed discussion of the situation in SIZO can be found later in this section. The number of women prisoners had decreased over the year: at present 7,597 (against 8,599 in 2005) women are imprisoned, while 1980 (against 2,104) are held in SIZO. The number of convicted juveniles also decreased over the last year from 2,698 to 2,215. Furthermore in SIZO their numbers had fallen somewhat, to 1,220 against 1465 a year ago. There were however 145 more life prisoners in 2006, rising from 1,218 to 1,363 prisoners, with the number of women life prisoners reaching 14.

Table 1

	Total number of convicted prisoners
01.01.1999	206 191
01.01.2000	218 083
01.01.2001	222 254
01.01.2002	192 293
01.01.2003	197 641
01.01.2004	191 677
01.01.2005	188 465
01.01.2006	170 923
01.01.2007	160 725

According to Department figures, on 1 January 2007 the enforcement of sentences not connected with imprisonment was overseen by 703 subdivisions of the Penal Enforcement Inspection with 2,232 members of staff. As of 1 January 2007 there were 160,078 people registered with the Department's Penal Enforcement Inspection (against156 335 a year earlier) of whom 8 thousand were juvenile offenders. The average officer of a territorial unit of the Penal Enforcement Inspection is responsible for over convicted offenders, while in some inspections this number reaches 200.

According to Deputy Head of the Department N.Kalashnyk «2006 should be definitive for developing the Penal Enforcement Inspection whose work has been the focus of constant attention by the Department's management. A strategic direction for this development, in keeping with State policy in the area of European integration is the gradual creation of a probation service. Such a service will make it possible to reduce the number of people imprisoned and will lower the financial outlay of the Department. On 3 August 2006 the Cabinet of Ministers passed Resolution No. 1090 approving the State programme on improving the conditions of prisoners and those remanded in custody for 2006-2010.»

In 2006 the President pardoned 991 people, of whom 651 received shorter sentences and 376 were released from penal institutions.

The Department's Report for the fourth quarter gives the following breakdown of the crimes people were convicted of and demonstrates continuing problems. Against a general reduction in the number of people held in penal institutions at the beginning of the year, the number convicted of robbery and aggravated robbery increased by 5.3%. The number of convictions for premeditated murder with aggravating circumstances also rose by 3.3% Approximately 60 thousand prisoners are serving sentences of over 5 years. 1,363 were sentenced to life imprisonment with the sentences having come into legal force.

During 2006 an extra 322 places were created in penal institutions, and 90 places for people sentenced to life imprisonment.

A State Programme was drawn up on improving conditions for convicted and remand prisoners for 2006-2010, with this approved by Cabinet of Ministers Resolution No. 1090 from 3 August 2006. The same Report for the fourth quarter states that overall for the objectives set, the Programme envisages financing just from the State Budget of 2.3 billion UAH. However in 2006 the Programme received only 3.3% of the amount allowed for (14.1 million UAH of the 549.2 envisaged), while in 2007 5.2% has been planned (28.4 million UAH instead of the 549.2 envisaged).

Together with the State bodies mentioned, the Department drew up and passed to the Ministry of Justice a draft Ukrainian Government Report on enforcing the recommendations and comments made by a delegation from the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) based on its fifth inspection tour of Ukraine during which it visited penal institutions. The draft Report details the organizational and practical measures taken by the authorities aimed at eliminating failings, and creating the proper conditions for remand and convicted prisoners.

At the same time general statistical data cannot give an understanding of the real conditions in which prisoners are held. These conditions remain quite harsh. This is how the head of the system

himself assesses them. In an interview to the newspaper «Holos Ukrainy» [«Voice of Ukraine»], the Head of the State Department for the Execution of Sentences Vasyl Koshchynets stated:

«To be honest, the conditions prisoners are held in are not indeed a cheerful subject. Despite the Law «On pre-trial detention» in some pre-trial detention centres [SIZO] there are nearly three thousand more people than there are actual places. They sleep all together, or have to simply take turns. In such conditions you look forward to a meeting with the judge like to a romantic rendezvous. Most of the regime areas of the SIZOs were built back under the Tsar, and you can only talk about the reliability of the walls and the roof over the remand prisoners' head using serious hyperbole.

You won't get by either without straining your imagination with the description of those buildings which on paper go by the name of medical institutions of the penal system. The list of equipment and the equipment itself had become obsolete back in the time of the famous Gleb Zheglov [a homicide investigator in a Soviet film from the late 1970s – translator]».[3]

Remand and convicted prisoners are increasingly approaching the European Court of Human Rights with complaints about conditions and ill-treatment in the Department's institutions. For example, Mr Lee from Horlivka in his application complained of bad conditions while remanded in custody, and of the excessive duration of that remand. Although he was serving a ten-year sentence imposed by the court, the State offered him an amicable agreement. Mr Lee agreed, stipulating payment of 10,000 Euros

Several convicted prisoners (H. Druzenko and others) lodged applications in 2001-2002 with the European Court of Human Rights alleging ill-treatment when the special reaction unit «Berkut» was brought into their penal colony. Their applications were declared partially admissible on 15 January 2007 and they are presently being considered on the merits. It should be noted that the administration of the penal institution has reacted in a rather specific manner to this application. Supposedly 10 of the 13 applicants from different colonies suddenly decided to withdraw their applications to the European Court. However the Court has decided not to exclude their applications until a more thorough investigation has been carried out.

There have been other judgments from the European Court. As reported in the media:

«The European Court of Human Rights has ordered Ukraine to pay Nikolai Dvoinykh from Simferopol 2,000 Euros for inhumane treatment while he was being held in SIZO [pre-trial detention centre]. The applicant was the director of a company when, on 23 March 2000, he was arrested on suspicion of theft and misuse of his official position. In July a court found him guilty and sentenced him to four years imprisonment. Nikolai Dvoinykh asserts that he was held in a cell of around 14 square metres with 16-17 other inmates, and some of them had tuberculosis or AIDS. There were not enough beds in the cell, nor light and fresh air. The cells were dirty and teeming with cockroaches and bedbugs. Not one of the cells had hot water, and cold water only reached the fourth floor of the building which was not heated.»[4]

According to the Government's Representative on European Court of Human Rights affairs, Yury Zaitsev, as of March 2007 Ukraine had paid more then 58.5 thousand Euros in compensation for bad prisoners' conditions in penal institutions. Among the violations of prisoners' rights which elicit concern in European institutions, Zaitsev named the conditions convicted prisoners are held in, and all related issues – adequate medical care and treatment, proper treatment of convicted prisoners by the staff of penal institutions, as well as of remand prisoners in temporary holding facilities.[5]

3. PENAL LEGISLATION

There were almost no significant changes in penal legislation during 2006. It is worth pointing out, however, that over 2006 amendments to the Penal Code [Kryminalno-vykonavchy Kodeks] were drawn up (draft law No. 2491). These were discussed within the Ministry of Justice with public

[3] «Holos Ukrainy» No. 96, 27.05.2006
[4] «Holos Ukrainy» № 192, 14.10.2006
[5] The website «RBK-Ukraina» 22.03.2007

participation. To a large extent the amendments take into account those shortcomings of the Code which are pointed out in the analogous section of *Human Rights in Ukraine – 2005.*

The Department states that «in order to further improve implementation of State policy on the execution of sentences, as well as to draw up and implement new principles for the execution and serving of punishment, the Department has prepared an updated draft Development Strategy for the State Penal Service [Derzhavna kryminalno-vykonavcha sluzhba]. This was discussed with experts from the Council of Europe, approved at a meeting of the Department's scientific and methodology council and sent to the Council of Europe Coordination Committee on reforming the Ukrainian penitentiary system for the latter's recommendations». From this list of institutions involved in discussing the Strategy, it can be seen that neither independent scientists nor representatives of the community were involved. The Development Strategy was not discussed outside the department.

At the same time the norm-creating activities of the Department present certain problems. Last year's Report gave the following recommendations: «to change priorities in law creating activities, giving preference to humanitarian values over issues of the technical functioning of the department; to increase attention to issues relation to the observance of human rights, respect for the human dignity both of people imprisoned, and personnel of the penal institutions, and not just confine oneself to declarations on this subject», and «to contribute to an improvement in the normative acts of the Department, ...and to involve specialists in this work, including the Penitentiary Association of Ukraine». Despite these calls, the Department in fact continued and even increased its practice of issuing normative documents which violated human rights.

A number of examples of inadequate norms produced by the Department are cited by lawyer from the Chernihiv Women's Human Rights Centre Valentina Badyra. On 25 January 2006 the Department issued Order No. 13 approving an Instruction on checking correspondence. In accordance with this Instruction, prisoners put letters to be sent into a post box unsealed. Letters to the Human Rights Ombudsperson, to the Prosecutor's Office, to the European Court of Human Rights, as well as to other relevant international bodies which Ukraine is a member or party to are sealed in an envelope, pursuant to points 2-4 of the Instruction in the presence of an inspector. Correspondence which arrives from the above-mentioned is unsealed by the prisoner in the presence of an inspector.

We should add that on 5 June 2006 the Department introduced amendments to the internal regulations for penal institutions which stipulate that correspondence between prisoners and the above-mentioned institutions are not liable to be checked, are sent where appropriate or handed to prisoners sealed (in an envelope). Bearing in mind that the two orders regulating the procedure for sending such correspondence differ, it would seem reasonable to ask which document actual members of staff should be guided by in checking correspondence.

Furthermore, 1.7 (appendix No. to the above-mentioned Instruction) envisages that the inspector places a special stamp on the envelope of outgoing mail which gives the name of the penal colony of the State Department for the Execution of Sentences and its postal address. According to Ms Badyra, the use of such a stamp is an infringement of Article 301 «The right to personal life and confidentiality» and Article 302 «The right to information» of the Ukrainian Civil Code.

A special stamp on the envelope of outgoing mail is not envisaged by the law and whether it is or is not placed on an envelope can have no impact whatsoever on national security and the economic wellbeing of the State. After all, the European penitentiary rules (the revised text of the European Standard Minimum Rules for the Treatment of Prisoners), passed in January 2006 as Recommendation R 2006 (2) of the Cabinet of Ministers of the Council of Europe sets out the need for prisoners to have as frequent as feasible contact by post and other means with their families, other individuals and members of outside organizations. This contact can be restricted or controlled where this is necessary for the running of a criminal investigation, maintenance of order and safety, or to prevent criminal offences and to protect the victims of crimes. However, such restrictions, including those designated as special, are stipulated by the court.

On 30 January 2006 the Department issued Order No. 18 «On shortcomings in organizing early conditional release, transfers to a lighter form of sentence, preparation of material with regard to an appeal to be pardoned and measures on increasing control over this area of work».

The first part of this order complied with the general requirements for departmental acts, being of a non-normative and individual managerial nature and designed for application on a single occasion. However some provisions within the order (5.3, 5.4 and 5.5) envisaged mandatory agreement with the Department's territorial bodies of material regarding early conditional release or transfer to a lighter form of sentence as well as that connected with a pardon appeal, which gave the heads of the relevant services of territorial bodies powers not allowed for by normative acts. Furthermore, the same order set out a special procedure for early conditional release for certain types of crimes where the period of the sentence still to be served exceeded two years, this being in contravention of Article 21 of the Constitution which states that all people are free and equal in their dignity and rights; Articles 81 and 82 of the Ukrainian Criminal Code «Early conditional release from serving a sentence and transfer to a milder form of punishment»); Article 407 of the Criminal Procedure Code («Procedure for applying early conditional release or transfer to a milder form of punishment»), Article 154 § 3 of the Penal Code («Procedure for early conditional release»), as well as items 5, 6 and 7 of the «Regulations on granting a pardon» approved by Presidential Decree on 19 July 2005.

On 31.072006 through Order No. 142 «On amendments to Order of the State Department for the Execution of Sentences from 30.01.2006 no. 18», the Department was forced to bring the provisions of Order No. 18 into line with legislation. Items 5.3, 5.4 and 5.5 were presented in a new version which did not contain normative instructions.

The regulatory functions of the State Department for the Execution of Sentences cannot be unlimited. There needs to not only be a system of control over departmental normative legal acts, but also legislative regulation of the limits of their possible regulatory functions. In a democratic country such limits are established through norms with the juridical force of a law.

The main task when preparing and issuing normative legal acts is that they are produced on the basis of, and in order to enforce Ukrainian laws. All of this determines the need for strict regulation of norm-creating activities of the Penal Service.

4. OVERSEEING THE FUNCTIONING OF PENAL INSTITUTIONS

There are a number of State bodies empowered to check and oversee the activities of penal bodies and institutions, namely the prosecutor's office, the Human Rights Ombudsperson and the Accounting Chamber of Ukraine (see, for example, the results of an audit into the use by the State Department for the Execution of Sentences of State funding, published in *Human Rights in Ukraine – 2005,* Despite this, there has been no noticeable improvement in observance of human rights. Public control entrusted to overseeing committees is effectively non-existent, while the work of civic organizations is viewed by the Department's management as only an additional resource for work on reforming prisoners. The Department claims to cooperate with over 550 civic organizations, yet the public councils created under the auspices of the Department, which representatives of the community must join, are as a rule headed by former employees of the penal system. Even the management of the Department acknowledges that these public councils are effectively not functioning. It is worth stressing that the autonomous nature of the Department makes it difficult for independent structures to oversee its activities.

The Department often talks of wide cooperation with civic organizations. Its top management claims that:

«*there is interaction with civic organizations on cooperation in the area of reform and re-socialization of prisoners, providing them with legal, social and psychological help. In adherence to the principle of transparency of the State Penal Service, the Department actively cooperates with 150 human rights organizations. Nearly 40 religious denominations and organizations registered in Ukraine carry out work in Ukrainian penal institutions. Approximately 23 thousand believers serving sentences attend services and other religious events*»

However such organizations are never viewed by the Department as an element of public control.

Deputy Head of the Department N,H. Kalashnyk stated during an address given on 4 September 2006:

«We have systematized cooperation with civic organizations towards more purposeful and targeted participation in solving prisoners' social problems. At the same time, however, one should point out the small role played by public councils attached to territorial divisions. The potential presented by overseeing commissions is also not being used to a sufficient degree, especially with regard to their authority to exercise public control over the observance of the rights and legitimate interests of prisoners. Given a certain exacerbation of the operational situation in places of deprivation of liberty, a range of organizational –practical measures have been applied for more intensive organization of the process of socially usually employment of prisoners on a national-patriotic basis»

National Deputy K. Levchenko's suggestion is as follows:

«immediately create representative offices of the Human Rights Ombudsperson in the regions in order to carry out monitoring and visit penal institutions. Include civic organizations in the national preventive mechanism against torture, involving them in visits.»[6].

However such suggestions from National Deputies have thus far had no real response from the management of the Department.

The single body which is not subordinate to the Department and which oversees the latter's work on a regular basis is the prosecutor's office. Although Council of Europe experts who have studied the work of the Ukrainian penal system recommend creating another body responsible for inspecting penal institutions with this replacing the prosecutor's office, the latter does not wish to relinquish its overseeing role. The Deputy Prosecutor General Oleksandr Shynalsky says:

«I have all grounds for asserting that in Ukraine a more than adequate number of State bodies have been created for carrying out departmental and non-departmental control and prosecutor supervision of the human rights situation in penal institutions. The existing normative base makes it possible to widely involve the public in carrying out public control for this same purpose. I am therefore absolutely convinced that in order to achieve our main aim, to truly safeguard human rights in penal institutions, we need to concentrate our efforts on increasing the quality and efficiency of the use by these State and public bodies of the rights and powers given them by the law.»[7]

At the same time, however, Mr Shynalsky pointed out that it was not enough to acknowledge violations. He cited as a serious problem, for example, the effectively unpaid work prisoners do while serving their sentence.

«It's not just that I am convinced that such work is equivalent to slave exploitation of prisoners. It is a glaring feature of the majority of institutions which we checked»[8]

During 2006 the prosecutor's offices repeatedly reported numerous problems in the functioning of the penal system and violations of human rights. Several meetings in the Prosecutor General's office were held on the issue with the involvement of civic organizations.

The media reported that:

«In the course of the last panel meeting on the results of the work of the prosecutor's offices last year, the Prosecutor General clearly articulated the tasks of the prosecutor's office. Torture, harassment and unlawful infringements on prisoners' rights must become a thing of the past. We will certainly exert all effort to achieve this. We will, though, demand dedicated participation in this of all interested bodies and institutions, first and foremost, of the State Department for the Execution of Sentences».[9]

According to a letter dated 1 December 2006 from the Prosecutor General to the Verkhovna Rada Committee on legislative backup for law enforcement work from 2004 to 2006 the prosecutor's office issued 9,954 prosecutor's responses as a result of which 7,756 penal service staff faced disciplinary or other proceedings and 61 were prosecuted.

According to information from the State Department for the Execution of Sentences from 20.09.2006 in response to an information request from the Kharkiv Human Rights Protection Group[10], «...during 2005 there were 295 appeals against unlawful behaviour by employees of penal

[6] «Holos Ukrainy» № 191, 13.10.2006
[7] «Holos Ukrainy» № 32, 18.02.2006
[8] Ibid.
[9] «Holos Ukrainy» № 32, 18.02.2006.
[10] Letter № 2/1-C-3730/5 from 20.09.06 signed by the Head of the Human Resources Department O.V. Shevchuk

service bodies and institutions, as well as 198 during the first half of 2006, however the allegations made in them were found to have no substance. There are no recorded cases where employees faced disciplinary or criminal charges as a result of our investigation into the complaints.» In another letter from the Department[11] more realistic data is provided, with the letter stating that:

«*During 2005 350 appeals were received alleging unlawful behaviour by Department employees. Of these the allegations were found to be warranted in 17 cases, partially warranted in 30 cases, and were deemed to have no substance in 253.*

6,168 people faced disciplinary proceedings during 2005 for various reasons.

Overall in 2005 12 criminal investigations were launched against 13 people and 6 former employees of the State Penal Service were convicted. One person was charged under Article 127 § 3 of the Criminal Code (torture)».

One is staggered by the difference between data presented by the Deputy Prosecutor General and the First Deputy Head of the Department. In the human rights organizations' experience virtually all complaints which prosecutor's offices receive from people convicted of crimes are deemed to be unwarranted. One can conclude that the violations which the prosecutor's offices uncover and which are spoken of in the above-cited letter either do not directly impinge upon the rights of prisoners or are concealed by Department institutions.

Thus, the lack of openness from the Department on the one hand, and the reluctance by prosecutor's offices to report on the results of checks as to whether penal system employees behaved lawfully, as well as the refusal to launch criminal investigations into flagrant cases of coercion in penal institutions, give the impression that the prosecutor's office control is ineffectual and inefficient.

Nor can one assert that the Human Rights Ombudsperson provides any more effective and real control. Over 2006 and in the first four months of 2007 the Ombudsperson's website contained only four press service reports pertaining to prisoners' rights These were reports on the voting during the parliamentary elections on 26 March 2006 in the Lukyanivsk SIZO; about the events in Lychakivsk penal colony No. 30 (near Lviv) in May 2006; on a meeting with European Commission experts; and on the conviction of the Yevpatoriya journalist Volodymyr Lutyev whose case the Ombudsperson had been involved in for several years. The numerous complaints which the Ombudsperson's Secretariat receives alleging unlawful behaviour from employees of the penal service are simply sent on to the very same Department and / or to the prosecutor's office. This happens even in those cases where Secretariat staff acting on the Ombudsperson's instructions, have carried out their own investigations into the events. For example, Secretariat staff spent nine days investigating the situation at the Izyaslav Colony No. 31 where on 22 January 2007 a spetsnaz [special purpose] unit brutally beat prisoners who were taken on the same day to serve their sentence in other institutions. At the same time, the complaints from the parents of these prisoners about the terrible beating were simply passed on by the Secretariat to both the Department and the Prosecutor General «for measures to be taken» [more information about these events can be found in the section «Against torture and ill-treatment»). No application, claim or other document regarding the rights of people deprived of their liberty between 2005 and April 2007 was made public by the Human Rights Ombudsperson.

The lack of public control over the activities of penal institutions as a real factor is confirmed by the fact that in reports about a number of extremely important events in these institutions, there was not one mention of overseeing commissions as structures responsible for exerting control over the observance of prisoners' rights. The system of public control over penal institutions is thus in need of radical change. This involves, first of all, significant refinement of the Regulations on Overseeing Commissions, the relevant norms of the Penal Code and the Law «On democratic civilian control over the military organization and law enforcement agencies of the State».

5. STAFFING ISSUES

The Department's staffing problems intensified in 2006. A considerable number of qualified personnel either left of their own volition or were forced to leave. They were replaced in part either

[11] Letter № 1/1-2827/12 from 30.06.06 signed by First Deputy Head of the Department A.S. Lahoda

by less experienced staff or by people who had no experience whatsoever of working in the penal system. This also included the highest levels of management. There has been no serious attempt to investigate any connection between this process and the increased difficulties in the operational situation in the colonies, first and foremost with the more frequent cases where prisoners resorted to extreme measures – hunger strikes and self-mutilation. It would hardly be justified, however, to deny such a link. This is attested to by present managerial staff and some high-ranking officials, as well as by people who until recently worked within the system.

The Department is itself aware that the staffing problem is acute. In the departmental newspaper «Law and Duty» the Head of the Department stressed:

«due to people having obtained the right to a pension, changes in the conditions for calculating this pension, as well as certain objective or subjective reasons, there has been a exodus of staff. As a result, the shortage in middle-level or senior management has increased from 8.8% to 11.3% as against the same period a year ago. We find similarly disturbing results from analyzing disciplinary practice for 2005. There was, for example, an increase from 6,702 (a rise of 20.6%) in the number of cases where disciplinary proceedings were launched against penal system staff. One observed also an increase from 106 to 126 offences and exceptional occurrences among members of staff, including a rise in the number of offences from 39 to 50, and prohibited contact from 32 to 40».

In a different context he said:

«We are generally suffering a dearth in staff. And without overcoming this, it will be very difficult to turn the system around 180 degrees – from a punitive to a humanitarian philosophy, yet it is precisely this task which confronts us. The times of the old officials deliberately concealing the shameful condition of those under them have gone, yet where, not to mention on what, do we find new people? There are no special institutions training staff in our area – specialists with a modern way of thinking. There are no psychologists who could work with the staff. Just imagine the state of a person who voluntarily, for an 8-10 hour shift, remaining behind a tightly closed door together with criminals! Living in conditions of permanent stress is also a form of self-torture.»[12]

However this is how the former Head of the Kharkiv regional division of the Department for the Execution of Sentences V. Butenko assesses the present situation:

«In our colonies there is presently a move back to the Gulag system. This is most evident in the staffing policy of the new leadership. There was always a shortage of staff, and many who were taken on proved to be unsuited to working in penal colonies. However we were quite clear that if these people once discredited the system, they had to be got rid of. Now just take a look at what's going on in the Kharkiv region. The head of colony No. 100 was once dismissed from his post as head of a SIZO. Under him they put two kilograms of grain into a hundred litre pot, and called it porridge. And instead of meat they were given bouillon from bones, and bones with nothing, not even a bit of cartilage left on it. After that sort of diet for a couple of months, people's stomachs were totally destroyed.

They've removed the real professionals from our penal system, and replaced them with people like those I mentioned, or people who had never had any experience of work in penal institutions. Yes, they may be bright but it will still take them a while to get to know the ropes, and there's no place in the penal system for hangers-on. People «from the side» must not be appointed to the highest positions. That's what leads to incidents like the mass self-mutilation in the SIZO»[13]

A case which gained considerable publicity was that of the former head of the Lviv SIZO Vasyl Romanyshyn. He is accused of having caused bodily injuries to subordinate officers and of professional negligence. As of September 2006 the case was still being heard in the Halytsky District Court in Lviv. The victims' lawyer Natalya Krisman told the Western Information Corporation that the court was soon to hear evidence from Vasyl Romanyshyn's former deputy Illya Yatsyshyn. «I think that his testimony will cast light on the case» she said. She added that the court debate was planned for the near future. «I think that the case will be concluded in September».[14]

However this was not to be, and in January 2007 the victims' lawyer stated that the court investigation was being dragged out deliberately. The Halytsky Local Court had agreed that the rights of

[12] «Holos Ukrainy» № 96, 27.05.2006.
[13] «Evening Kharkiv», 09.08.2006. (for more on this in English see: http://khpg.org/en/index.php?id=1155243925)
[14] http://cupol.brama.com

the defendant during the pre-trial investigation had been infringed and had therefore sent the case back for further investigation. In an interview to the Ukrainian Service of Deutsche Welle, Natalya Krisman stated that according to her information, the court's decision had been influenced by people from higher court bodies. She added that the victims were constantly facing attempts to intimidate them. «Throughout the investigation and in the court there were threats against participants in the proceedings and against me personally. At present there could have been more witnesses in the case, however due to pressure imposed on them, many, excuse me, developed amnesia». The lawyer added that the victims are not demanding a stiff punishment. Let it be mild, a conditional sentence, but in the name of Ukraine – that was important. Romanyshyn denies any guilt and claims that the case is fabricated. The decision to send the case for more investigation has already been appealed in the Lviv Regional Appeal Court. The case against the former head of the Lviv SIZO has already lasted over a year.[15]

It should be stressed that the position of the Department hierarchy on this court case has not been made public and remains unknown.

Nor can one leave out the mood among personnel which is reflected in the following comment which appeared on the Department's website.

«In 90% of the regions in January 2007 the penal system staff did not receive 25% of the money due them. The Department doesn't even lift a finger. They're not bothered how their subordinates will pay communal charges which have doubled or triple. How they'll feed their families, and so forth.

While you in the capital think that you're paying a decent wage, there will continue to be cases like those in Kharkiv, Lviv and Izyaslav. It's time now to change something – you're not the only ones who want a life. Ordinary employees also dream of having their own life and normal pay. Think about that, our esteemed management!»

A serious problem for the penal system is corruption. The management of the Department attempt to silently avoid this subject, and if sometimes they mention isolated insignificant instances, they are presented as exceptions. For example, in her address on 4 September the Deputy Head of the Department N.Kalashnyk mentioned only one case of corruption among the system's employees. «Unfortunately, this year saw a case of corrupt activities among personnel of the Inspection for the Dnipropetrovsk region». However, there are a fair number of reports of such cases in the media.

Here are a few examples just from the Donetsk region. As the media report:

«*A criminal investigation has been launched in Mariupol against officials of SIZO [pre-trial detention centre] No. 7. According to the head of the State Department for Fighting Economic Crime of the Donetsk regional MIA department Oleh Morhunov, the suspects are two officers of the internal service and the boss of a goods warehouse. In abuse of their official position, they falsified documents of a tender for the purchase of dry potatoes. As a result, the winning bid was that of an enterprise which would appear to be fictitious. Several hundred thousand UAH from State funding were transferred into the bank account of this enterprise.*

This is not the only scandal connected with the purchase of food items for penal institutions. In February of this year the head and deputy head of a regional division of the Department for the Execution of Sentences were caught red-handed. The bribe for concluding a deal on providing the colony with a consignment of food products came to 9 thousand US dollars».[16]

«*The Ordzhonikidze District Court in Mariupol has examined the criminal charges laid over bribe-taking by the head of the District Penal Enforcement Inspection. According to the Mariupol Police Press Service, Ivan Babayev was charged under Article 368 § 2 of the Criminal Code – «bribe-taking». In the course of their investigative operations, officers of the Ordzhonikidze District Department for Fighting Economic Crime, Babayev had for two months (and possibly longer) taken bribes from people released on probation, as well as from those ordered by the court to do public and corrective work. The convicted individuals had paid him varying amounts – from 10 to 300 UAH – so as to avoid administrative surveillance. All the transactions took place in Babayev's office. The investigators gave evidence for 13 analogous cases. Babayev receved a 5 year suspended sentence which has now come into force».*[17]

[15] www2.dw-world.de, 03.01.2007
[16] «Holos Ukrainy» , № 52, 25.03.2006.
[17] «Accent» » № 139, 20.09.2006.

The most prominent case took place in Donetsk.

There «*in February 2006 during a joint operation carried out by the prosecutor's office and a special division for fighting economic crime the head of the Donetsk Regional Division of the State Department for the Execution of Sentences and his deputy were caught taking a bribe of 9 thousand US dollars. The money was their «cut» for agreeing a consignment of food items to a penal colony*».

The newspaper gives the following details:

«*At the beginning of January two businesspeople won a tender to provide food products worth 1 million UAH to investigative SIZO No. 5. The contract guaranteed pre-payment, however after a first instalment the amount owing was not settled in full. According to the deputy head of the SIZO, a representative of the Department division whom he called the «Boss's man» explained the principle for further cooperation: 20 percent of the value of the meat, and 15 – of the value of other products needed to be transferred to the Department, otherwise they'd be replaced (supposedly an order from the main head)! And if they don't agree, they won't be able to work and they'll be plagued with complaints about the quality of their work....*

When the head's office was searched, his safe contained 10 thousand UAH and 26 thousand bucks, among which slightly to the side there were three thousand which glowed green under a special lamp (the money received in the Department for Fighting Economic Crime from the businesspeople).»[18]

„High-ranking officials caught taking bribes are being prosecuted under Article 368 § 2 of the Criminal Code (bribe-taking involving particularly large amounts, by a person occupying a position of responsibility). If the court finds the head and deputy of the Department division guilty, they face 5 to 10 years imprisonment with confiscation of property and subsequent ban on holding relevant positions»[19]

After almost half a year spent in SIZO, the preventive measure applied against the head of the division was changed. In writing about the court trial, the local press cited very interesting testimony:

«*From the witness testimony in court: «You had to discuss it with the guys – how much to give for the board». Heads of individual colonies «contributed» to the boss of Donetsk penal zones to the tune of anything between one and five hundred dollars « (the salary of the head of a Department division is around five thousand UAH, the salary of a colony head – around three thousand). Those providing contributions didn't have an easy time of it. They'd hardly run the summarizing board meeting for the year in January when in February again, though now at he Kyiv level, subordinates had to collect around the next «from 100 to 500» for the Head's business trip»*. Going by the specific details – who, and how much – you can draw conclusions not just about the level of affluence of specific heads. In order to work, you have to pay your bit. In order to pay your bit, you have to take it. That's the rule.

The defendant received a two year suspended restriction of liberty sentence. His property was not confiscated and he was not even banned from holding managerial positions. The prosecutor's office has already stated that it plans to lodge an appeal.

– Olha Bondarenko, head of the regional prosecutor's office department on backing prosecutions in court, recounts: «I encountered the model «open – closed» court hearing for the first time. (The defendant's lawyers convinced the court that what had gone on in his office was a part of his intimate life, and journalists were not allowed to be present at certain parts of the hearing – author). For the first time in my experience, the court imposed its procedure for examining evidence and questioned the defendant at the end, basically giving him an advantage. And for the first time almost all my applications were turned down.[20].

The fairly numerous cases of corruption and virtual lack of reaction to them, as well as the absence of a clearly stated position from the Department's leaders demonstrates serious staffing problems in the system. One can assume that the short-sighted and ill-considered staffing policy of the management has led to an increase in the prevalence of corruption within the system. One can also conclude that the rise in the number of incidents in penal institutions is to some extent yet another consequence of the present staffing policy.

[18] «Donbas», № 170,15.09.2006
[19] «Donbas» № 29, 11.02.2006.
[20] «Donbas» № 170, 15.09.2006

6. SURVEY OF PRISONERS

An important source of information about the human rights situation in penal institutions and prisoners' conditions is provided by surveys of convicted prisoners, as well as of people released from penal institutions. «Donetsk Memorial» endeavours to carry out such surveys on a regular basis. As part of the project «Observance of prisoners' rights» in 2006, monitoring was undertaken of prisoners' conditions in SIZO. [pre-trial detention centres]. We would stress that it took six months for the management of the Department to agree to such a study.

Despite the procrastination and obstructions from the Department management over giving consent for our monitoring, the latter proved possible thanks to the constructive position taken by the Department's regional divisions. We surveyed 113 people in four SIZOs, as well as 53 people released from penal institutions in two shelters. A separate survey was also carried out of 112 members of the SIZO staff. The results received enable us to identify problems with human rights observance in SIZOs. Using the same questionnaires, the International Society for Human Rights – Ukrainian Section (ISHR-US) surveyed 142 people held in SIZO No. 13 (Kyiv), the majority of whom are actually serving sentence in the institution, as well as 100 members of staff.

The results of Donetsk Memorial's survey were as follows: the general conditions in SIZO were assessed as «satisfactory» by 2/3 of those surveyed and «good» by 16 people. All of them were from present inmates of SIZO (14% of the prisoners surveyed), and not one from those already released. On the other hand, only 7 present inmates gave a negative assessment of the conditions while 18% of those already released (36 % of the respondents for the given category). Clearly, the person's present position (whether or not they are behind bars) has a noticeable impact on the nature and sincerity of their responses. 2/3 of the prisoners assessed the level of medical services in SIZO as average. It was classified as «low» by only 5% of those actually in SIZO and by almost 65% of respondents who had already been released. Only 13 people said that they had suffered torture or ill-treatment, or other acts of a coercive nature, with 11 of these people having already been released.

On this same subject, the responses from SIZO staff were as follows: the conditions for inmates were described as «good» by 77%; «satisfactory» by 13%; «bad» by 9% and «very bad» by 1%. 20% of those surveyed considered the level of awareness of international standards for the treatment of prisoners to be «low», with only 5% assessing it as «high». Yet only 5% of the staff members considered that they themselves need retraining. It should be stressed that there were questions which the respondents simply did not answer, for example, whether they considered that major repairs are needed to the premises in which they work. Working conditions were deemed satisfactory by 75% of the staff surveyed while unsatisfactory by the other 25%. On the other hand, the pay was not considered satisfactory by 75%, with the other 25% saying that it was fine.

According to the survey carried out by the International Society for Human Rights – Ukrainian Section, conditions for SIZO inmates were described as «satisfactory» by 64% of the respondents; good by 29 % and bad by 7%. Among problems, the following were mentioned: «a lot of people in the cells»; «food that's impossible to eat, bad heating and constant draughts»; «the cell is small»; «the attitude to them». The quality of food was described as good by 34% of the respondents, as satisfactory by 49%; as bad by 17%. The state of their cells were seen as satisfactory by 55%; as good by 42% and as bad by only 3%. The number of people held in the cells ranged from 2 to 40. . 45% of the respondents said that there were less than 8 in their cell; 25% – from 8 to 19; 30 % – 20 and more people. The number of bunks coincided with the number of inmates. All prisoners were provided with bed linen by the SIZO administration, with it being changed once a week.

With regard to what was in their cells, 34% of all those surveyed said that there was some kind of furniture, 8% said that there were items of household use. 37% said that they could keep food items in the cells, while 67% did not have such an option. They keep food products in a specially designated place in the dining area. Almost all cells have windows, with only 2 respondents saying that their cells were without windows. In the majority of cells (56%) the windows have iron bars on them from the outside.

With regard to sanitary and hygiene conditions, a third of those surveyed (31%) said that there was a toilet in the cell. Its sanitary condition was described as good by 33%, satisfactory by 52% and

bad by 15% of those held in such cells. There was the same situation with wash basins, being in a third of the cells. 96% said that there was a shower or place where they could wash.

The overall level of medical services was assessed by an overwhelming majority as average (79%). 18% described it as low, and 4% as high. The majority of those who answered the question about whether they receive all necessary medication, said that this was provided (76%). They get medicine mainly from medical personnel (68%) or from relatives (32%). Inmates have the opportunity to receive not only general, but also specialized medical care. For example, there is a dentist in the SIZO and the majority of respondents (72%) think that the surgery is well equipped. 67% said that they had access to a gynaecologist / urologist (andrologist).

10% of those surveyed alleged that they had been tortured, beaten or subjected to other brutal behaviour by SIZO staff or investigators. However only 4 people were prepared to say specifically who had inflicted this treatment.

The conditions for inmates in SIZO No. 13 were described as satisfactory by 82% of the SIZO personnel/ 14% considered them bad, and 4 % said they were good. The assessment of their awareness of international standards regarding the penal system showed that overall the level was considered average (69%) or inadequate (26%). 5% said that it was high.

There was a significant difference between the assessment of working conditions and pay by personnel of the capital's SIZO, and the four SIZOs in regional centres. 28% said that they were satisfied with the working conditions, 9% didn't know, while 62% said that they were unhappy with them. There was almost total dissatisfaction with the level of pay among the staff of SIZO No. 13. Only three people surveyed said that the salary they earned gave them an adequate standard of living. The others were either entirely dissatisfied (45%), or considered that the level of pay did not fully ensure a decent standard of living (52%).

On the basis of this monitoring one can draw the following conclusions:

– It is vital to monitor prisoners' conditions with it being worth doing this on a periodic basis in order to follow the dynamic of change;

– the top management of the Department for the Execution of Sentences should reconsider their negative attitude to such monitoring involving the participation of civic organizations;

– there need to be firmer efforts at ensuring that personnel of penal institutions are familiar with international standards of treatment of prisoners. In order to increase the level of responsibility of staff the level of awareness should be subject to checks;

– prisoners should be provided with information about their rights in written form, not only told of them verbally;

– prisoners' access to television, radio and the regular press should be increased;

– an investigation of the working conditions of prison staff should be considered an important element when investigating adherence to human rights norms in the penal system;

The results of another survey of prisoners, regarding the right of access to information, are presented next.

7. ACCESS TO INFORMATION

The problem of access to information remains serious in the penal system. The human rights organization «Donetsk Memorial» regularly sends information requests to the Department and its regional divisions regarding various aspects of their work. The degree to which these bodies respond to our requests for information has been steadily increasing from year to year. Nonetheless a certain number of divisions from time to time refuse to provide the information sought, either claiming that it is for official use only or recommending that we approach the central headquarters of the Department in Kyiv. Suggestions from the organization that the heads of regional divisions indicate the name, number and date when the normative act or other document (instruction, order, directive, etc) was passed which classified the information requested as being for any reason whatsoever not able to be provided on request have not received any response. This suggests that there are no such documents and that claims that the information sought is for official use only and cannot be provided

are effectively another form of refusal to give the information. It should be noted that the Department itself has on many occasions failed to provide information requested in a timely manner.

In summer 2006 «Donetsk Memorial» sent information requests to all regional divisions of the Departments with a number of questions. They concerned statistical data regarding some aspects of the work of penal institutions from 01.01.2006 to 1.07.2007. In all, substantive replies were received from 18 regional divisions, albeit in some cases following a repeated request.

Table 2

1.1	Rsegions	Кількість осіб в місцях позбавлення волі, 1.1.2006-1.7.2006	Пожиттєво увяз'нених	ВІЧ-інфікованих	Хворих на туберкульоз	Кількість померлих осіб	У тому числі суїцид	Кількість скарг від позбавлених волі	Кількість скарг, що підтвердилися
1	Donetsk		166 183	1066 1195	1555 1260	226 66	3 1	163 72	0 0
2	Poltava	6989 6637	6 4	107 130	0 0	21 9	1 0	0 0	
3	Dnipropetrovsk	16742 15745	44 46	492 348	944 806	49 22	5 2	45 27	12 12
4	Luhansk	14173 13895	77 83	247 292	628 588	45 27	0 0	39 15	0 0
5	Volyn	1882 1936		22 23	13 11	1 1	0 1	1 1	0 0
6	Zaporizhya	11320 11138	56 59			17 21		33 40	0 0
7	Kharkiv	14576 14282	70 74	211 220	1357 1369	76 46	0 5	50 42	5 4
8	Chernivtsi			4 4	0 0	2 0	1 0	5 1	0 0
9	Rivne	3866 3790	47 49	57 48	45 22	7 2	0 0	15 7	0 0
10	Khmelnytsky	5547 5397	90 100	58 64	0 2			1 0	0 0
11	Zhytomyr	5837 4903	207 208	50 64	95 35	15 3	1 1	25 8	10 1
12	Kirovohrad	3637 3469	4 5	0 0	21 19	5 3	0 0	23 42	0 0
13	AR of the Crimea	3878 3843	19 16	82 100	6 14	7 2	0 0	21 8	0 0
14	Ivano-Frankivsk	2337 2125	4 4	24 17	1 3	7 4	2 2	36 17	7 2
15	Ternopil	2399 2360	2 2			4 1		9 0	7 0
16	Odessa	7112 7126	20 24	434 408	236 95	12 9	1 1	95 59	1 0
17	Kherson	6686 6263	3 2	267 296	63 62	138 67	0 1	26 3	26 3
18	Lviv		72 70	41 38	258 268	12 5	4 0	461 218	258 11
19	Kyiv city and region	4717 4743	32 16 24	20 32 54	35 36 62	27 24 30	5 4 4	9 5 12	
IN TOTAL		167321	1329	4313	6115	393	23	115	20

Answers were not given, or there was simply no response at all, from the Department divisions in the Transcarpathian, Vinnytsa, Chernihiv, Sumy, Mykolaiv, Cherkasy,and Kyiv regions. After filing a suit with the court against their infringement of legislation, the Kyiv region did send the information. The information provided is presented in Tables 2 and 3.

From Table 2 it is clear that life prisoners are held mainly in those regions where the appropriate institutions or parts of institutions have been created. With an overall increase in the number of HIV-infected prisoners, their number in some regions is decreasing. The overall trend, with some exceptions, is towards a reduction in the number of people with tuberculosis. The considerable number of deaths among prisoners in the Donetsk and Kherson regions is linked with those regions containing special institutions for those with tuberculosis. It is those institutions that make up a considerable part of the mortality figures.

Interesting figures were given with regard to complaints and whether these were found to have substance. In half the regions which provided responses, not one complaint had been deemed justified in 2006. Only in seven regions were there complaints which had been found warranted. Given the fact also that in the Analytical Report on appeals and complaints placed on the Department's website, there is no information about the number of complaints received directly by the Department which were found to have substance, one must acknowledge that it is not possible to gain an understanding of the actual level of effectiveness of the present mechanism for providing and examining complaints. The conclusion therefore seems reasonably warranted that prisoners in Ukraine are effectively unable to use the mechanisms for making complaints in order to defend their rights. The Department is not taking any real steps to seriously reform the complaints system, and is thus failing to create the opportunities for prisoners to defend their rights through an effective and confidence-inspiring system for complaints. One consequence of such indifference to human rights was the string of incidents of a protest nature which became noticeably more frequent in penal institutions during 2006 (more details later in the text).

Table 3

1.1	Regions	Number of people held in penal institutions as of 1.1.2006 1.7.2006	Number of convicted prisoners	–	Number of people in SIZO	–	Arrivals in penal institutions	Released	Of these, the number released from serving their sentence	Number registered with the Penal Enforcement Inspection	The amount of space in penal institutions	The amount of space in SIZO
1	Donetsk		18337 17683	3,4 3,54	5318 4789	2,2 2,46	6838 2977	7933 3258	4564 2257	17616 17823	62644,79	11794
2	Poltava	6989 6637		2,86 3,01	1180 1011	2,28 2,66	5115 2009	3221 1344	2334 932	5742 5667	19987,5.	2693,8 .
3	Dnipro-petrovsk	16742 15745	12937 12331		3805 3414		13573 5459	6956 2843	4217 2053	27830 19828	41869,36	11365,2
4	Luhansk	14173 13895	12113 11791	7,08	1983 2021	8,4 8,28	10322 4257	6166 2302	4230 1744	11731 11676	83502,1	16737
5	Volyn	1882 1936					890 336	554 178	331 98		10473	880,75
6	Zapo-rizhya	11320 11138	9654 9665		1666 1473		7450 3880	3931 1625	1429? 637	9717 9537	47202,	7198
7	Kharkiv	14576 14282	11550 11374	3,93 3,99	3026 2908	2,52 2,6	8734 3484	7293 2701	3032 1303	11780 11699	45422,3	7636
8	Chernivtsi		1327 1287				692 248	422 160	127 45		7980,4	1568,9
9	Rivne	3866 3790	3426 3396		440 394	3,05?	2374 942	1746 541	1055 362	2171 2435	13 957	1173

10	Khmel-nytsky	5547 5397	5131 4920		416 477		5301 2433	2087 741	641 246	3880 3771		
11	Zhytomyr	5837 4903	4890 4903	3,95	740 631	3,78	8604 3965	2401 767	1308 440	4506 4392	19324,	2796,5
12	Kirovo-hrad	3637 3469	2788 2618	4,97	849 851	6,25	2024 889	1403 604	733 405	4136 4197	13004,83	5308
13	AR of the Crimea	3878 3843	2090 2139	5,2	1753 1739	3,38	925 526	881 373	385 185	8876 8759	10936,14	5874,29
14	Ivano-Frankivsk	2337 2125	1886 1650	2,96	451 434	3,7	1122 527	1123 535	541 338	2037 2130	4876,8	1599,1
15	Ternopil	2399 2360	2200 2167	3,15	199 193	5,3	1368 690	1014 429	521 223	1628 1601	6844,1	1028,8
16	Odessa	7112 7126	4688 4412	3,28	2424 2714	2,65	2403 751	2404 795	1390 464	8719 8710	14477,2	7204,17
17	Kherson	6686 6263	5306 4931	8,27	1380 1352	10,9	13187 4257	2575 889	748 256	5342 5520	40779,4	14745
18	Lviv		6994 6976		1301 1187		4098 1743	2670 1064	1034 516	4983 4964	33728,47	3536,8
19	Kyiv city and region	4717 4743			2493 2615 2750		4500 2072	2472 908	942 467	10499 10636 10819	33535,92	14811
IN TOTAL		167321					47012	24074	14261		499039	92480

Table 3 shows changes in the number of prisoners in the Department's penal institutions, statistics on releases, as well as the number of people registered with the Penal Enforcement Inspection. Most interesting is the information regarding the space per prisoner. According to the Penal Code, the amount of space per person, with certain exceptions, must not be less than three square metres. The questions put by Donetsk Memorial pertained to specifically this size.

Most divisions who gave responses did provide this information. It is clear that the figure of 3 square metres is adhered to in many regions, and if it is infringed, then as a rule not significantly. The information from the Kherson and Luhansk regions are surprising. Clearly the size of the space includes not only the place where prisoners sleep, but also a considerable number of other premises.

From the table, one can also see what information specific divisions did not provide, with their responses therefore being incomplete. Nonetheless, it should be noted that the majority of regional divisions adhere to legislation on information and respond to formal requests for information on time and in full.

It should be stressed that the information requests envisage the possibility of actually receiving the information, and not being referred to other information sources which sometimes do not in fact contain the information. This is what Mr Vysochansky does in his response of December 2005, when instead of providing information, he writes:

«*In view of the fact that ... State statistics are openly published and open access to them is guaranteed, you have the opportunity according to legally established procedure, to read the statistical information*». Such a response is an effective fob-off and refusal to provide information.

Donetsk Memorial turned in July 2006 to the Head of the Department. Our letter spoke of infringements by heads of regional divisions of the Department on responding to formal requests for information concerning penal institutions. Given the prevalence of infringements both in the regions, and at the central offices of the Department, we suggested that measures be taken to prevent such abuse in future. A reply signed by Mr Olentsevych stated: «*measures are constantly applied to ensure the thorough processing of letters and information requests from individuals and civic organizations and to provide well-founded responses within the legally established timeframe*». The letter also informs that the situation as regards interaction with civic organizations was reviewed at a board meeting within the Department. It is further promised «to draw up the relevant regulations which will also stipulate the rules of procedure for providing information».

One of the fundamental elements determining a penitentiary system's level of openness is the opportunity for members of the public to receive information about its activities. The situation presented here suggests that the majority of heads of Department divisions fail to appreciate the importance and public significance of providing the public with this sort of information. We would add that, most regrettably, not one of the letters received from the Department contained an assessment of the above-mentioned infringements of the Constitution and Law «On information» by heads of regional divisions of the Department.

In another letter from Donetsk Memorial sent to the head of the Department at the beginning of 2007, we noted: «One has the impression, possibly mistaken, that the management of the Department through their lack of response to such instances is tacitly encouraging the management at local level to infringe the law in this way. Unfortunately these have been instances in the Department when somebody has, only verbally, advised the heads of regional divisions to refuse under any pretext to provide information to our organization. This is not the only example where the real actions of the Department and its managers run counter to the public declarations and statements regarding cooperation. Furthermore, the open reluctance by the management of the Department to take real measures against those who infringe information legislation only serves to encourage the repetition of such infringements and to adversely affect the effectiveness of interaction. In order to prevent such infringements in the future, we suggested that the Head of the Department issue the necessary Order, or instruction, which would bind the management of penal service offices and institutions of the Penal Execution Service to strictly comply with legislation on information and to insist on the forced provision of information., unless of course it is classified as information on limited access. To a certain extent as a result of disregard from the Department management of the vital need for transparency, the situation virtually didn't change. In responding to our information requests did not provide the necessary information, sometimes claiming that it was «for official use only»

It was only after the intervention of the Minister of Justice that in March 2007 the Head of the Department issued the relevant directive for regional divisions requiring that they «*unfailingly comply with information legislation when informing individuals and civic organizations about the work of offices and institutions of the penal service, including in response to formal requests for information*».

In their Reports, the Department pays attention to the issue of access to information. It is stated, for example, that «over the year the library stocks of penal institutions have been replenished with 111 thousand books from educational institutions, charities and other organizations, and at present holds around 1.8 million books».

With regard to cooperation with the media, the Report for the fourth quarter of 2006 states: «During 2006 the central mass media covered 135 stories involving the work of the State Penal Service of Ukraine. During that period, 53 applications from the media for information to prepare television features, reports, programmes, interviews, etc were considered». There is, however, no information about the number of those 53 applications which were granted. Considering the size of the country and the number of institutions in the system (over 180), such a number of applications is too small.

A worsening in the situation as regards access to information is also attested to by former managerial staff. In the interview already quoted with the former Head of the Kharkiv regional division of the Department, Volodymyr Butenko says:

«We were already moving towards a European level of prisoners' standards. And now the process has been frozen. I don't think there will be a total return to the GULAG system, but this halt could cost us dearly. Here again all information about what is happening in the colonies is not available, and the press can only try to jump to catch a glance at what is going on behind the fence. And from the other side they also jump, trying to throw over at least some kind of information»[21]

From the beginning of 2007 the departmental newspaper «Law and Duty» ceased issue, although subscriptions to it had been carried out, and its publication was thus financed. When the subscription ended, the paper had an overall print run of around 40 thousand (32 thousand subscribers (31 thousand copies for the «special contingent», i.e. prisoners, and another 8 thousand subscribers – members of the public who are interested in prisoners' matters, and also staff of penal

[21] «Evening Kharkiv», 09.08.2006. (for more on this in English see: http://khpg.org/en/index.php?id=1155243925).

colonies). Prisoners have for several months been deprived of access even to this paper which is one of the few relatively reliable sources of information about life in the outside world.

In 2006 Donetsk Memorial carried out a special study of the situation with access to information as part of its project «Ensuring the right of access to information in Donetsk regional penal institutions» which is supported by the Open Society Institute. The research showed the following:

On the basis of our study and an analysis both of questionnaires, and of legislation and present practice, we established the following:

– Both remand and convicted prisoners receive information about their rights in verbal form. Situations where prisoners each received a printed copy of this information were the exception.

– Penal institutions have libraries, however the selection of juridical and legal publications is extremely limited;

– There is virtually no information in the institutions about lodging complaints;

– The staff have very limited resources and opportunities for ensuring the prisoners' access to information;

– Prisoners are most interested in learning about the social services which provide assistance after their release;

Our survey showed that penal institution personnel, as a rule, have the following normative acts to hand: Department Instructions; Internal Regulations; the Criminal Code and the Penal Code. As far as other normative documentation is concerned, they are generally only familiar with its contents. A small number of employees had never heard of the Convention against Torture and Judgments of the European Court of Human Rights.

The results of the questionnaire among people released from imprisonment found that two thirds of the former prisoners had visited the library 1-2 times a month. The same number said that the choice of books had only «partly» satisfied them. 70% said that there wasn't enough fiction and publicist writing, while 50 % pointed to there being not enough legal material. The respondents either did not know whether there were most of the codes and laws in the library, or said that there weren't copies. They were most interested in finding out about the social services which provide assistance to released prisoners as well as about the activities of the Human Rights Ombudsperson. The respondents said that information about events in the country and in the world, as well as about their rights, had been available. They considered that the level of access to other information had been «very low». With regard to information about means of lodging complaints, 10% said that they had had no access whatsoever. Two thirds of the respondents said that getting legal consultations had been a problem.

Judging by the responses from penal administrations in the Donetsk region, almost half of the institutions do not have copies of the Criminal Procedure, Civil Procedure and Civil Codes. Some institutions do not have copies of the Laws «On the Human Rights Ombudsperson», and «On social adaptation of people released following imprisonment». On the other hand, more than half have copies of the European Convention on Human Rights, and the European Convention against Torture, as well as the European Penitentiary Rules. Each penal colony in the region has between 4 and 22 televisions, and between 15 and 73 radio reception points.

The most frequently named factors preventing prisoners from exercising the right of access to information were the lack of legal material and insufficient financing for providing literature.

In order to improve the situation with access to information, we would recommend that the State Department for the Execution of Sentences do the following:

– allow for mandatory funding and provision to all libraries of laws and legal literature, especially collections of the Codes;

– remove restrictions on the number of telephone calls, and also provide the technical equipment to colonies to enable prisoners to have such conversations;

– provide each convicted prisoner with information about their rights and duties in printed form, widely using material prepared by civic organizations within the framework of joint projects;

– ensure that cells and premises where prisoners are held, especially SIZO, have information about prisoners' rights in printed form;

– have libraries stocked up with various forms of material, including fiction;

– not confine subscriptions to regular publications to the newspaper «Law and duty»;

– stipulate mandatory familiarization by members of staff with international standards in the area of human rights and treatment of prisoners, actively using wherever possible the resources of human rights and other civic organizations;

– create proper conditions for staff to become familiar with documents indicating the minimum standards for treatment of prisoners – Judgments of the European Court of Human Rights, the Conventions and Reports of the European Committee against Torture;

– involve overseeing commissions in resolving issues around providing prisoners with information.

Access to information in penal institutions remains a serious problem. For its resolution, resources are needed, as well as real stamps from the management. At the present time both are conspicuously lacking.

8. CONDITIONS IN PENAL INSTITUTIONS

The conditions in which convicted prisoners are held in the Department's institutions have been gradually improving over recent years. The main factors are a general improvement in the socio-economic situation in the country, as well as a noticeable reduction in the number of prisoners. however financing for the penal system is being increased too slowly. The Budget for 2006 amounted to 1 billion 68 thousand UAH, yet due to inflation and price rises, this amount is inadequate. According to Oleksandr Shynalsky, Deputy Prosecutor General:

«Last year (2005 – Editor.) for all programmes on buying food items, the State Department for the Execution of Sentences received 118 million 980 thousand UAH. All of two whole UAH are spent on food for each person in custody. From all programmes last year, 15 million 173.5 thousand UAH were spent on medicines and dressings, this constituting a little more than 7 UAH per month per person. I would invite the readers to draw their own conclusions as to how inmates eat and the medication they receive in SIZO and penal colonies. And this is while on 1 January 2006 there were more than 9 thousand people with tuberculosis held in penal institutions, including 952 people in SIZO. . Last year there were around four thousand HIV-infected in these institutions, of whom 76 were diagnosed as having AIDS. The medical institutions of SIZO and penal colonies are overcrowded, as of 01.01.2006 by 110 and 978 people, respectively.

Regrettably, one can continue reciting this list of details confirming numerous violations of human rights in penal institutions. However the facts already presented are, I think, sufficient for one important conclusion – Budgetary means, if they have already appeared, need to be urgently directed towards the State Department for the Execution of Sentence. This is to finance previously drawn up and approve government programmes aimed at ensuring fundamental human rights in penal institutions. Since over recent years, instead of working, we've mainly been occupied with drawing up precisely such programmes and plans, we have quite correctly and sensibly accumulated quite a number of these».[22]

The main problem remains the lack of work in penal colonies. The Head of the Department notes that: «the present majority of prison enterprises can safely be described as reserve areas with rare museum items. Technological backwardness and dilapidation of the main areas of production amount to more than 65 percent. As a result only some of the 80 thousand able-bodied individuals can be provided with jobs.[23]

These problems received coverage in other media outlets:

«The Kherson Regional Administration has approved a regional programme for creating new jobs. This year (2006) the region's penal institutions hold 5,300 people sentenced to periods of imprisonment. 420 people are employed in production-linked work. Almost 2,800 able-bodied prisoners (87%) have not been provided with employment».[24]

[22] «Holos Ukrainy» № 32, 18.02.2006.
[23] «Holos Ukrainy» № 96, 27.05.2006.
[24] «Uryadovy kuryer» [«Government Courier»] № 228, 2.12.2006

«The numbers held in penal institutions of the Zaporizhya region at the present time is even lower than the norm. The premises are well aired, the beds made with clean bed linen however no cleaning or disinfections can get rid of the pervasive smell of prison from the dining area. Financing from the budget for prisoners' food ... does not exceed 35-45% [of that intended].

Very often the head of a penal institution has to choose between paying civil workers wages or spending the money on food for the prisoners. If he balances too long on the edge of the law and human duty, they can launch a criminal investigation against him... That's nothing new, at least for the Zaporizhya region.

Penal colony enterprises only have a third of the working places that they actually need. For that reason the prisoners take turns and only those who have children or who have to pay compensation for material damages they caused. As a result of their gloomy reality, enforced inactivity, as well as the lack of any opportunity to find fulfilment, many develop psychological disorders, and people have even died of heart attacks. The administration expressed the view that even a sophisticated executioner couldn't come up with a worse form of torture than being forced to do nothing»[25]

Despite a certain improvement, problems remain for prisoners in gaining an education. The Department describes the overall situation in this area as follows:

«There are 150 general educational units in the penal institutions. Of these 37 are general education schools, 92 – evening class units, and 21 – study consultation centres. Overall, around 10 thousand prisoners are presently studying in the various units.

As well as 11 vocational and technical colleges in juvenile educational colonies, from 2004-2007 educational units were created and have been steadily functioning in 74 penal institutions. These annually help over 10 thousand prisoners gain a vocational-technical education and improve their skills in more than 60 trade professions.

Based on the results for the 2005/2006 academic year, 749 convicted prisoners received educational documents. Of these 392 received certificates confirming basic general secondary education; 357 – full general secondary education, while 1,116 received a professional trade certificate. In addition, at the present time 56 prisoners serving sentences have been helped to enter courses of study at higher educational institutions via correspondence».

At the same time, the Deputy Head of the Department N.Kalashnyk in her address on 4 September 2006 pointed out that:

«The actual conditions for general education or vocational technical training in penal institutions of the Penal Service do not comply with current legislation nor with the level required in today's world. In the Ivano-Frankivsk region, only 27% of prisoners without general secondary education were engaged in studies; in the Ternopil region – 28%; the Lviv and Zhytomyr regions – 30%. In the majority of institutions, educational unit resources need to be radically updated. Such units are functioning in unsuitable premises in a number of institutions in the Donetsk, Zhytomyr, Kirovohrad and Lviv regions. Insufficient attention is paid to creating favourable working conditions for teachers. The majority of educational units do not have separate offices for the teaching staff. Nor have adequate measures been carried out to ensure teachers' personal safety while in the institutions».

The press report individual initiatives aimed at engaging prisoners in education and socially useful work, as well as measures aimed at reforming them.

The problems outlined here also have impact on the psychological climate in the colonies and on prisoner behaviour. In 2006 there was a noticeable increase in the number of offences committed by prisoners. According to the Department, the number was one and a half times greater than in 2005.

The management of the penal system are also aware of these problems. Deputy Head of the Department N.Kalashnyk notes that «The level of penalties imposed per thousand prisoners (in 2006) is 13% higher than for the same period a year ago. The average rate is considerably exceeded in institutions in the Lviv, Chernihiv, Poltava, Kyiv, Dnipropetrovsk and Kherson regions, while there has been a sharp rise in the level of penalties imposed in the Kherson, Ivano-Frankivsk, Chernihiv, Kyiv and Dnipropetrovsk regions.

[25] «Holos Ukrainy»», № 225, 28.11.2006

The number of prisoners confined to disciplinary isolation units [DIZO] increased in the Kyiv region by 46%, the Chernihiv region – by 38%; the Kirovohrad region – by 28% and in the Sokyryansky Penal Colony it quadrupled. The number of prisoners transferred to PKT [cell-like accommodation, also as punishment] almost tripled in the following regions: Kirovohrad, Ivano-Frankivsk, Kharkiv and Kherson.»

In another Report, the Department states:

«An improvement has been achieved in the level of work of operative units, in identifying and eliminating negative tendencies among prisoners. Since the beginning of 2006 419 criminal investigations have been launched in penal institutions against convicted or remand prisoners. Of these 53% were under Article 391 of the Criminal Code as preventive measures aimed at averting more serious crimes. The measures applied have made it possible to stabilize the operational situation in penal institutions, improve discipline among convicted prisoners and prevent much publicized crimes.»

The assessment given here of the effectiveness of the «measures applied» does not always entirely coincide, or even more exactly, is contradicted by the noticeable increase in the number of incidents in penal institutions, as well as of the level of crime among inmates. We should also note the extremely curious grounds for launching a criminal investigation «as preventive measures. Such practice requires careful and thorough independent study.

The media also report positive examples of work with prisoners. For instance:

«The Department organized an exhibition in Kyiv of pictures sent by prisoners. Department Head Vasyl Koshchynets is convinced that such exhibitions help prisoners to change their predilections and develop positive characteristics, leading to regret for the crimes they committed. The prisoners have expressed what is alive in their souls in these works. In the main they depict Ukrainian landscapes, happy scenes from life and many churches. According to a Department spokesperson, through their art the prisoners are purified and improve, this being taken into account when considering amnesties. Moreover, the pictures can be sold and the money placed in the personal account of the artist who created it. It should be mentioned that persistent re-offenders and those who committed grave crimes are not allowed to take part in the competition.»[26]

«Prisoners from the Voznesensk Penal Colony organized an exhibition sale at which they presented their work – unique icons, items out of church plate and pictures. On the money they made from sales, they purchased equipment for an immunity and infectious diseases unit, scales for newborn babies and part of a compressor inhaler».[27]

There are also opposite trends. In his interview, former Head of the Kharkiv regional division of the Department for the Execution of Sentences V. Butenko speaks of recent changes in the region's institutions:

«And who had a problem with a school for cooks in the 18th colony, or a studio of fashions in the 54th women's unit? Or the puppet theatre in the children's Kuryakska? Sure, art education is not envisaged by legislation, but people were involved in something, they even turned down early conditional release just so as not to miss the premiere performance! And I'm convinced that such people are much less likely to revert to their criminal past. There's nothing like that now – all the projects have been stopped. And yet it's long been known that if we don't find convicted prisoners something to do, they'll find things for us to do.»[28]

Sometimes institutions receive assistance from people held in them.

«Russian businessman Maxim Kurochkin who was awaiting the outcome of his case in SIZO No. 13 gave 200 thousand UAH for the legendary Lukyavnivsk SIZO (where at one time the leader of BYuT Yulia Tymoshenko was held). Max Besheny [Mad Max] claims that his idea is that the money should be spent by the management of the SIZO to improve inmates' conditions. And yet they didn't let Kurochkin directly help «inhabitants» of the SIZO (tea, crackers, sweets, cigarettes, etc)!»[29]

During 2006 there was no noticeable improvement in the conditions for convicted prisoners, nor was a resolution found to numerous problems of the Department. On the one hand, the man-

[26] «Donbas», № 161, 01.09.2006
[27] «Holos Ukrainy», 16.12.2006
[28] «Vecherny Kharkiv», 09.08.2006
[29] «Donbas», № 235, 22.12.2006

agement acknowledges these problems and stresses the need to resolve them. On the other hand, real steps are often replaced by high-sounding declarations and mere imitation of decisive actions. A careful analysis of the quantitative indicators for the Department, as well as statistical data, leads us to speak of attempts to manipulate data in order to avoid showing negative trends or on the contrary to create an impression that there are possible moves taking place where in fact there aren't. Such practice is not new for the Department and its management however there are no signs that the new leadership are rejecting it. Quite the opposite attempts to avoid independent investigations demonstrate attempts to strictly control information coming out which objectively reflects both the state of the system and present trends.

9. MEDICAL PROBLEMS

According to figures from the Department, on 01.01.2007 there were 4,695 HIV-infected people in penal institution, and approximately 7.6 thousand people suffering from an active form of tuberculosis. During 2006 there were 741 deaths among inmates of the Department's institutions, including 44 cases of suicide. The mortality rate comes to 4.6 per thousand prisoners (on average the figure in the country is 16.0).

The Department asserts that:

«Medical care is provided in penal institutions in compliance with the Law «On the Fundamentals of health care legislation in Ukraine» and the joint Order of the Department and the Ministry of Health from 18.01.2000 No. 36. Normative legal acts are based on the principle of adequate response and the level of medical care to people deprived of their liberty corresponds to the level of medical care to the population at large». It is clear that the «basing» of normative legal acts on a highly important principle does not yet mean the real implementation of this principle in practice. This is demonstrated by the following results of research and facts».

Research on how the right to life is observed in closed institutions, carried out by Donetsk Memorial as part of their project «The right to life: European standards and Ukrainian reality», initiated by the Kharkiv civic organizations «Civic alternative» showed that:

Mortality in penal institutions is an indicator reflecting in integrated form the results of efforts by the State to safeguard the right to life. Data on illness and deaths in institutions of the State Department for the Execution of Sentences which Donetsk Memorial has received over recent years from the Department itself are given in the following table.

Table 4. Illness and deaths in the Department's institutions

Indicators	1.1.2004	1.1.2005	1.1.2006	1.1.2007
The number of people in penal institutions	191 677	188 465	170 923	160 725
Deaths	824	808	868	741
Per thousand prisoners	4,30	4,29	5,08	4,61
Cases of suicide	41	44	40	44
Per thousand prisoners	0,21	0,23	0, 23	0,27
Suffering from an active form of tuberculosis	9 080	10 198	9 020	around.7,6 thousand
Per thousand prisoners	47,37	54,1	52,77	47,28
HIV-infected	1 917	3 568	4 058	4 695
Per thousand prisoners	10,0	18,93	23,7	29,2

Given the noticeable changes from year to year in the overall number of people in penal institutions, it seems justified to consider figures per thousand prisoners, rather than absolute figures.

An analysis of the figures from this table shows that in 2006 (reporting as of 01.01.2007), the mortality rate decreased however only in comparison with the previous year (from 5.08 to 4.61), while it still remains higher than the level for 2003-2004.

There is no exact information about the causes of death however it seems entirely warranted to assume that the main cause was diseases, especially tuberculosis. It is not possible to say whether a fatal outcome was inevitable in these cases. A special study would need to be carried out to ascertain this. However the rate of change in mortality figures shows that there have not been any noticeable successes and changes over recent years in penal institutions, despite the claims of the Department's management.

The number of deaths from tuberculosis have decreased over the last two years and have reached the level (if calculated per thousand prisoners) of 2003. The number of HIV-infected prisoners is rising relentlessly which is probably linked with the present trend in society as a whole.

There have been cases where convicted prisoners not being able to get any of their demands met by the penal administration have attempted to slash their wrists or injure themselves in order to force the administration to listen to their demands and examine the issues involved. The extent to which the authorities are concerned about the danger to prisoners' lives in such situations is demonstrated by the position of the Head of the Department for the Execution of Sentences presented in a letter addressed to the Head of the Ukrainian Helsinki Human Rights Union on received the anti-award «Thistle of the Year – 2006». Mr Koshchynets maintains:

«It should be noted that group self-mutilation incidents among convicted prisoners are one of the ways of influencing the penal institution administration in order to have the regime established by law for serving sentences made milder and to avoid punishment for offences committed. However none of the cases of self-mutilation among prisoners presented any danger to their health and life and was of a demonstrative nature.»

This assessment by the Head of the Department of the motives which made prisoners resort to self-mutilation is not corroborated by any other independent sources and is, to put it mildly, does not comply well with international standards for the observance by the State of the right to life.

Cases are known of the health, and perhaps also the life, of prisoners being subjected to danger through methods applied during searches of colony living quarters involving specially trained units. It is highly telling that the Head of the Department says that adherence to the law during searches carried out using special purpose units is attested to not by checks undertaken by independent bodies, but merely by the lack of complaints.

«During these measures special means and measures to expert physical influence on convicted or remand remands were not applied which can be seen in the lack of complaints from prisoners against unlawful behaviour by the staff of the special purpose subdivisions.»

The results of investigations into incidents in colonies are not published, with this overtly contravening the standards of the European Court of Human Rights

On the results of departmental checks of the medical situation in institutions, one of the top people in the Department said the following:

«Despite the fact that last year and this year there have not been any outbreaks of intestinal infections in penal institutions and SIZO, a selective check of 58 institutions in 18 regions highlighted a number of significant shortcomings which could in future have an adverse effect on the epidemic situation in penal institutions. The artesian wells in 20% of the institutions checked do not comply with sanitary norms. Daily sanitary clearing of hard everyday waste is not carried out in 32% of the institutions checked.

The shameful result of the work of the management of the Department division for the Poltava region was seen in the outbreak of skin complaints in the Bozhivsk corrective colony No. 16 at the beginning of this year.

In carrying out the above-mentioned project «The right to life: European standards and Ukrainian reality», the following recommendations were made:

1. Carry out regular research (monitoring), including by civic organizations of various aspects of the work of penal institutions related to the observance of the right to life within the system's institutions.

2. Draw the court's attention to the excessively harsh and unwarranted approach when considering whether to release a person with a serious illness from serving his or her sentence.

3. The Department and Ministry of Health should complete work on circulating a List of illness which constitute grounds for presenting material to the court regarding an early release.

4. The Department for the Execution of Sentences must publish the results of investigations into exceptional incidents in the system's institutions.

5. The Department should reject the practice of demanding written statements from convicted prisoners alleging ill-treatment or violation of their rights that they have no grievance against the penal administration, and of using such statements as arguments to confirm the lack of violations.

10. CONDITIONS IN SIZO

The use of remand in custody as a preventive measure remains unwarrantedly high in Ukraine. Quite often the measure is used against people who are accused of not particularly serious crimes, and they are sent to SIZO more for the convenience of the investigator, than because it is impossible not to apply this measure.

One of the indicators of whether the use of remand in custody is warranted is the number of individuals who are released from SIZO. It is precisely those people in whose case, as a rule, the use of such a preventive measure was least justified.

In 2006 58,559 people were placed in SIZO, while 13,270 were released from them (against 15,040 in 2005). This was 22.3% (against 19.3% in 2004) of the number who were placed in SIZO. In these cases release was:

- in connection with the courts applying a punishment
- not involving imprisonment 7346 people (against 8487 in 2005)
- on the period of their sentence having ended 3673 people (against 3987)
- in connection with a change in preventive measure 2109 people (against 2250)
- due to the court terminating the investigation or to acquittals 120 people (against 293)

Clearly the expediency of holding the majority of over 13 thousand individuals in SIZO is extremely questionable since not one of them in the end received a serious sentence. The responsibility for this situation lies in the main with judges who sanction remand in custody.

The results of Donetsk Memorial's study of the conditions in SIZO are presented in the subsection «Survey of former prisoners».

11. THE SYSTEM FOR LODGING COMPLAINTS. EXCEPTIONAL INCIDENTS

One of the mechanisms for protecting prisoners' rights is an effective system for making complaints. The Penal Code of Ukraine does not provide such a mechanism and there was no notable progress during the last year in this direction.

Mechanisms for lodging complaints have partly been discussed already in the subsection on access to information, reviewing the data from Table 2.

According to the «Analytical Report on work with appeals within the State Department for the Execution of Sentences in 2006», posted on the Department's website, during 2006 the Department received by post or was handed appeals from 7,290 people, this being 874 less than during 2005 (8,164). It is reported that of these appeals 696 came from the President's Administration (against 998 in 2005); 108 (against 112) from the Verkhovna Rada; 547 (against 907) from the Cabinet of Ministers; 120 (against 187) from National Deputies (MPs), and 1,721 (against 578) from other State bodies, bodies of local self-government, institutions, organizations and enterprises. 5,022 (against 5,027) were received directly from individuals.

The website states: «1,341 (1,182) were repeat appeals, this making up 18% (against 14.5%). Most often in repeat appeals (this is probably a mistake and should read simply «in appeals» – Editor), the following issues were raised: a transfer from one institution to another – 2,332 (against 458); their early conditional release – 1,020 (145); improvement in prisoners' conditions – 197

(74). «192 (against 290) appeals concerned improper treatment of prisoners, while 289 (against 350) pertained to shortcomings in the work of the institutions.

The appeals can be broken down as follows:

- applications 6,104 (against 6693);
- proposals (comments) 62 (21);
- complaints 945 (1350);
- requests for information 179 (100).

It is worth noting that with regard to appeals pertaining to shortcomings in the work of the institutions, the Report asserts: «In response to all appeals which were found to have substance, measures were taken to remove the shortcomings in the work of the institutions, and to prevent them in future and disciplinary measures were taken against those responsible. No information, however, is given regarding the number of such appeals. There is also no such commentary with respect to «complaints concerning improper treatment of prisoners», and there 192 of these. it is thus unclear whether the information in them was found to be warranted. This selective approach to providing information about the review of complaints and their responses is rather pretence at openness, than an actual opportunity to assess thorough examination of such complaints.

Confirmation of a blasй style of response by Department employees to appeals is provided by the example on the website where the issue of convicted prisoner O.M. Andrushchenko's transfer was only resolved following a submission from National Deputy A.V. Rakhansky. In fact, sometimes even Deputies' appeals cannot help resolve an issue. This was the case when considering the proposal from Donetsk Memorial to carry out monitoring in some SIZOs. In response to a request for information from National Deputy K.B. Levchenko, the Department management informed that «for certain reasons» it did not consent to such a study, but failed to explain what exactly the reasons were). It also gave incorrect information stating that the civic organization had been informed of this.

As already mentioned, seven regional divisions in 2006 failed to provide Donetsk Memorial with actual responses to their information requests, this being in breach of the Law «On information». Yet in the Analytical Report quoted, it is asserted that «no cases were identified in 2006 where public officials, offices and institutions of the penal system had breached the provisions of normative legal acts regulating work with citizens' appeals». The clear failure of this assertion to correspond with reality, as well as the fact that Ms Kalashnyk in her address cited only one example of corruption, while the press had reported a whole list of such cases, raises doubts as to the veracity and objectivity of information provided in other Reports of the Department.

The fact that convicted prisoners are unable to resolve problems by lodging complaints makes them resort to more radical action.

2006 saw a number of incidents in penal institutions during which remand or convicted prisoners resorted, in protest, to hunger strikes or acts of self-mutilation.

The events which gained the greatest publicity took place in May in the Kharkiv SIZO and the Lychakivsk Penal Colony in Lviv. The media reported:

«The press service of the State Department for the Execution of Sentences maintains that in the «Kharkiv SIZO during a search of one of the cells, prohibited personal and other items were removed. In order to avoid punishment for offences committed, three remand prisoners stirred up some of the other prisoners of that cell to attempt suicide. Eighteen prisoners supported the unlawful behaviour and used blades from single-use shaving blades to inflict upon themselves slight cuts, however all this was of a simulated nature.

It would seem like an insignificant incident, not worthy of public attention. Yet a few days later, in the Lviv region Lychakivsk Penal Colony another such suicide attempt took place. Twenty four convicted prisoners slashed their wrists.

By now you can't call these isolated incidents. Particularly given that while this material was being written, another report emerged. The prisoners stated that they were not trying to avoid punishment. They had simply had enough of living in such conditions. The sanitary conditions in the colonies are terrible, and not in keeping with any norms. Conditions in which twenty people are held in one concrete room can in no way be called humane. And the regime in the institutions only leads to them feeling resentment

against the whole world, and not to reform. Of course, people can't endure it and resort to protest actions since there are no other means for having an impact on the system.

The people are indeed desperate. Simulated slashes to their wrists have already turned into crucifixion. One of the prisoners nailed down his feet to the floor. You can't help asking yourself whether some personal item or unauthorized clothing could really cause such a furore.

What do they want? By now, it seems, only meetings with journalists.

If officials and employees of the penal colonies cannot bring prisoners' standard of living to at least a minimum acceptable level, who knows how many detainees will reach for a noose?[30]

This is the explanation for what took place offered by one of the specialists, former Head of the Kharkiv regional division of the Department Volodymyr Butenko. He sees this as first and foremost «symptoms of a crisis in the system. He warns that in the near future Ukraine could be swept by a wave of prison uprisings. He says that the situation in Ukraine's penal institutions requires radical measures and that this was at the top of the list of issues discussed at the last general meeting held at the Prosecutor General's office, during which the state of Ukraine's penal institutions as they are at present came in for a lot of criticism Mr Butenko believes that «If they (the prisoners – Editor) have begun cutting their veins, it's because they want attention from the outside world, they don't trust the administration. Now that is a very serious signal.

They should have spoken with everyone in the cell, in the presence of lawyers, and in the first instance with those eighteen prisoners who didn't support the «action». They should have been given the chance to say whether it was the administration at fault, or the prisoners.

Instead, both in Kharkiv and in Lviv, where a few days later prisoners did the same thing, they tried to conceal the whole thing for a few days and didn't let anyone in to see them. This can only suggest that all that time, they were being systematically worked on. It is vital to draw the necessary conclusions as soon as possible since if these things are not reviewed as they should be, they will lead to even more serious problems on a nationwide scale. If in the nearest future nothing changes, Ukraine faces a wave of prison uprisings, with what happened in Kharkiv and Lviv being the first warning of this. Disgruntlement is obviously on the increase. I would predict that in half a year in our colonies there will be further disturbances, events of a mass nature.»[31]

Mr Butenko adds:

«From the point of view of the administration, an inmate must be obedient, intimidated, and answer «yes sir!». And the best way to achieve this is to keep the prisoners in inhuman conditions. For example, a SIZO provides the gates to the prison system. A person who's ended up there could have been at liberty the previous day. He's shaking with fear, and the first thing they do is tell him «You're nobody here, you're scum» and punch him in the kidneys. The person's terrorized, and even more eagerly hands over money. It's terrible. But it's precisely this we're seeing a return of.

The problem is that while people are in the colonies, they won't say anything to anybody. They claim that prisoners can write to the prosecutor, but nobody will read their letters. And where, in even one colony, will the head not open a package sent by his prisoners to the prosecutor? That's why there aren't any official letters, just bits passed on through circuitous routes. And then, when the person has been released, it's too late to prove it all».[32]

The current Head of the Kharkiv regional division of the Department Oleksandr Kizim does not agree with Mr Butenko's assessment.

«I would like to state that these assertions are not even contentious, they are absurd. Such «predictions» are unfounded and intended to discredit and create a negative impression of penal institutions and their personnel»:[33]

The Department management do not consider that the acts of disobedience were caused either by bad conditions or ill-treatment of prisoners by the personnel.

This is the assessment of the events given by the Head of the Department Vasyl Koshchynets

[30] «Uryadovy kuryer» № 90, 17.05.2006.
[31] «Evening Kharkiv», 09.08.2006. (for more on this in English see: http://khpg.org/en/index.php?id=1155243925).
[32] Ibid
[33] Ibid

«We were helped to understand the real nature of what took place by those who immediately began commenting on «prison ways» on television. The most incredible thing is that these are former high-ranking officials of our system dismissed for, to put it mildly, observing with indifference these ways. These mass-scale attacks were clearly planned in advance, and therefore the legitimate suspicion arises that somebody from outside is running this process and had studied the text of angry accusations even before the blades were taken up.

Here are some interesting details to think about. They took means of communication away from the mutineers, and it was precisely for that reason that the press first heard about the «bloodshed», and not the heads of the regional divisions. The first reports were generally frightening, with people slashing their wrists and brutal crushing of rebellion. In actual fact this was not even self-mutilation, but simulation of such. The situation is being hyped up deliberately in order to stir public opinion.

Incidentally, when the action was repeated in Lviv, a general and former employee of the system phoned the Department and expressed strong surprise that only 24 people had made such incisions. He admitted that according to his information, there should have been a lot more, four hundred (!). When I learned of such a slip, I thought: it's not only Lviv. There may be a continuation of the operation.

Fortunately, we succeeded in getting the situation under control. I personally travelled about the institutions, and spoke with people. I think ***there will be no more such attempts*** *(our highlighting – Editor), however annoying that may be for those orchestrating things behind the scenes»*[34]

The Department management believes:

«the prisoners did not have serious grounds for insubordination. He considers that «the Kharkiv SIZO has among the best conditions within our system. Unfortunately, the same cannot be said of the Lviv penal colony. As we learned, the general really did have grounds for surprise. Since preparations were under way to get everybody in the cell, or even the entire institution to take part in the action. However not all prisoners supported it. They see changes in the system and don't want to take part in senseless provocation. And the fact that people wanting to do some «stirring» could be found is our mistake. In both cells we had allowed an excessive concentration of convicted prisoners with a negative bent. The necessary conclusions have now been made»[35]

In other words, the only fault of the prison personnel was in «allowing an excessive concentration of convicted prisoners with a negative bent». No other causes are indicated.

Assurances by the Head of the Department that «there will be no more such attempt», and the optimism expressed by O. Kizim proved unwarranted. The exceptional incidents in penal institutions became more and more frequent.

For example, the Luhansk branch of the Committee of Voters of Ukraine reported at the end of August of an indefinite hunger strike in the Starobelsk SIZO.

Oleh Kapshchuk and Ihor Zubchenko remanded in custody in the Starobelsk SIZO have been on hunger strike for more than 10 days. According to Oleh Kapshchuk's mother, her son has lost a lot of weight, and the staff of the SIZO are threatening that on the 14th day, they will put straightjackets on her son and Zubchenko and force feed them. The two men, who have been remanded in custody for more than 2 years declared an indefinite hunger strike beginning on 24 July 2006. They have only one demand – the right to a court examination of their criminal charges. The criminal case against Oleh Kapshchuk and Ihor Zubchenko has been sent back by the court for further investigation four times. Oleh Kapshchuk's mother has sent telegrams about the men's indefinite hunger strike to the President of Ukraine, the Ministry of Justice and the Prosecutor General.[36].

A month later, on 20 September 2006, prisoners of cell No. 317, SIZO No. 3 in Dnipropetrovsk declared a hunger strike. At the beginning there were 8 people involved, but it was stated that if their demands were not met, the hunger strike could envelop the entire SIZO.

The prisoners were protesting against inhuman conditions and reported mass-scale harassment by specially trained units of the State Department for the Execution of Sentences, during which prisoners were beaten, their clothes removed and trampled on. They were intimidated and parcels from their relatives were demonstratively destroyed. They said that the cells were unsanitary and damp,

[34] «Holos Ukrainy» № 96, 27.05.2006.
[35] Ibid.
[36] «Prava Ludyny» [«Human Rights»], № 22, 1-15 August 2006.

and that there were insects. They were not bought hot meals to the court, and on days when court hearings were planned, they were woken at 5 am and thrown into small cages where they were held for several hours, and that the same procedure was repeated upon their return from the courts.

After eight convicted prisoners from Cell No. 317 refused to eat their meal, they were moved into an adjoining cell No. 316 with a broken toilet and ridden with insects. The UHHRU report suggested that the SIZO administration, in order to conceal the protests, might continue to intimidate and put pressure on them to get them to end their strike. The prisoners asked the administration to inform the Human Rights Ombudsperson Nina Karpachova of their demands and asked that she personally study the situation with the human rights abuse in SIZO No. 3.[37]

Another report stated that *«the State Department of Ukraine for the Execution of Punishments has confirmed information regarding a collective suicide attempt by prisoners of the Berdyansk Penal Colony in the Zaporizhya region. Five prisoners attempted suicide in order to improve the regime in the penal institution.*

A number of Ukrainian Internet websites reported that 20 prisoners had tried to take their life. An unofficial report said that this was in protest at the actions of the administration of the colony.

The State Department for the Execution of Punishments confirmed that an incident had taken place, however commented that the five inmates had been trying to shorten their time.

«The five people were demanding a milder regime. That is all in fact that I am able to say. The institution is an institution and it has its regime which cannot be infringed», a spokesperson from the Department for the Execution of Punishments Oksana Vyelkova-Lahoda stated. She added that a special commission was studying the circumstances and motives for the incident.

In Ukraine this is already the third suicide attempt by prisoners in protest at the actions of the management of the given penal institution. As reported, such attempts were made by inmates of the Kharkiv SIZO [pre-trial detention centre] and the Lviv penal colony»[38]

We are also told that «The hotline on business issues of the Chernivtsi City Centre for the protection of private businesspeople and small enterprises (hereafter the Centre) received information from a reliable source regarding the penal colony No. 67 in the town of Sokyryany in the Chernivtsi region. The source stated that prisoners serving their sentence in section T3 (cell-type prison conditions) on 11 August 2006 were given worm-ridden bread with their dinner. On their demand that the bread be changed, the duty officer helping the Head of the Colony took no action and instead said that those serving sentences should not pay attention to such a «food supplement» (!) and continue their dinner.

From Friday 11/08 to 15/08, 100 men were on hunger strike. They have not written an official statement to the Head of the Colony Viktor Stanislavovych Lipinsky, they have simply been refusing food.

The prisoners have only one demand – that the quality of the food is improved.

At 13.30 on 15 August 2006 the hunger strike by 100 men at Colony No. 67 was called off. This was made possible thanks to intervention in the conflict by the Head of the Head of the Chernivtsi Regional Division of the Department for the Execution of Punishments Vasyl Solovyov.

Thanks to the joint action of the authorities, the media and the public, the conflict was settled.

The Head of Colony No. 67 promised that there would be no recurrence of the incident with the food, but cited insufficient financing of his institution as a factor. The Hotline has established a permanent link with Colony 67 and will ensure that any other violations of human rights are communicated to the authorities and to the public» (16.08.2006).

Yet the Department's Reports present the following assessment of the incidents and the measures applied. The Deputy Head of the Department N. Kalashnyk, in her address on 4 September 2006, argued:

«The management of the State Department for the Execution of Punishments consistently demands a proper level of provision of work among the contingent of the penal service with regard to preventing self-mutilation and suicides. Each such case is examined as an exceptional event given that it firstly demonstrates the inability of the penal administration to comply with the requirements

[37] www.helsinki.org.ua 25.09.2006

[38] http://khpg.org/en/index.php?id=1156190682&w=Berdyansk in English.

of Article 10 of the Penal Code on protecting the life and health of individuals held in these institutions.

Secondly, self-mutilation and suicides, as a rule, have an adverse effect on the operational situation and moral and psychological situation among prisoners and lead to negative publicity in society. Vivid examples were provided by the events in the Kharkiv SIZO and Penal Colony No. 30 in the Lviv region which destabilized the situation not only in those institutions, but in the system overall.

In order to improve the organized activity of Department staff in this area, the Department has drawn up Method Recommendations «Prevention of suicide among people held in penal institutions», announced in the Directive No. 1744 from 06.12.2005. This year the Department has sent three directives on ensuring the proper level of work on these issues. However the real state of affairs demonstrates that in a number of bodies and institutions, the Department's requirements are being ignored and adequate measures to overcome depressive elements among remand and convicted prisoners are not being applied.

As a result, during this year in penal institutions, there have been28 suicides among remand and convicted prisoners (against 20 for an analogous period last year). The largest number of cases occurred in the Kharkiv region institutions (5 cases). there were four in the Kyiv region and one each in Dnipropetrovsk and Ivano-Frankivsk regional institution.

The checks carried out show that the main reason for such incidents was a low level of interaction between the services, as well as the weak position taken by the psychological service.

Incidentally, psychologists have the following registered for prophylactic measures: 1,3 thousand people at risk of committing suicide; 1.1 thousand inclined to self-mutilation; 3.1 thousand inclined to use narcotic substances; 2.8 thousand people with psychological disorders; more than 1 thousand – with a tendency to create conflict situations among prisoners; and 4.3 thousand who have been ostracized by other prisoners.

10 positions as psychologists in penal colonies remain vacant, of which three are in Kharkiv regional institutions, one each in institutions in the Vinnytsa, Dnipropetrovsk, Zhytomyr, Zaporizhya, Kyiv, Mykolaiv and Poltava regions.

During the first half of the year, 21 psychologists were dismissed, over the same period last year the number was 10. Despite the great work carried out by personal of juvenile educational institutions to improve the educational-developmental process, the state of affairs in institutions is a cause of concern.

The results of work by the collective of the Pavlohradsk juvenile educational colony and the territorial division are cancelled out by the group killing of a juvenile prisoner (It should be remembered that an identical crime occurred in December of last year). Bodily injuries as the result of conflict which the administration failed to prevent were inflicted on underage prisoners in the Kovelsk and Pryputsk educational colonies. In the Sambir educational colony a situation was permitted where underage prisoners avoided surveillance from a building of the unit for social adaptation (this was effectively an escape).

And absolutely shameful cases unacceptable for educational colonies were the suicide of a convicted prisoner in the medical unit of the Kremenchug educational colony and the attempted suicide at the Melitopol educational colony. Penal legislation stipulates the right of prisoners to health care which must be provided by a system of medical, sanitary, and preventive health measures»

It is a telling sign that the Department management should analyze the reasons for the incidents which took place in terms of «the inability of the penal administration to comply with the requirements of Article 10 of the Penal Code («The right of convicted prisoners to personal security») and the adverse effect of suicides and self-mutilation on the operational situation and moral and psychological situation among prisoners There is at the same time not a word about observance of human rights or about the possibility that personnel were guilty of ill-treatment. Nor are there any references to documents giving the results of investigations into the incidents.

With regard to the use of torture against prisoners, the penal service has always held the position that such cases are relatively rare in comparison with police institutions. Penal administrations have always denied any widespread use of torture. It would therefore seem extremely important to con-

sider the view on this of a person who until recently held a managerial position in the system – the former Head of the Kharkiv regional division of the Department. Asked whether there really are so-called «press huts» in SIZO, he answered:

«Of course. The point of such «press huts» is that the people are «pressed upon», i.e. forced to confess to crimes or to give some information. It's all simple: you have 4-5 prisoners to carry out instructions in one cell, and you place the person you want to «crack» in there. He has only to set foot in the cell, and there on to him. And that's it – the person won't sleep, eat, drink until he says what they need. These «press huts» are essentially a legacy from the days when the Department was under the control of the police. We don't have anything to do with uncovering crimes, it's not our task, but unfortunately we still follow orders, whereas we must get used to the penal system clearly existing within a legislative sphere. A person comes, serves his sentence with all his rights observed, and nobody can give the command to «exert influence» on him. For this, in the first instance, we need public control. The system must be open and if a person having been put in a SIZO starts having pressure put on him, he should be able to get a lawyer to defend his rights immediately.»[39]

Numerous problems with observance of prisoners' rights are also mentioned by the Ministry of Justice. The Minister Oleksandr Lavrynovych, when summing up the first year's coordination which the Ministry of Justice has been carrying out since 2006 of the work of the State Department for the Execution of Sentences reported that:

«The Ministry of Justice receives numerous complaints from convicted prisoners, their relatives and members of human rights organizations alleging violation of the constitutional rights of prisoners, which according to those complaining are being hushed up by the Department. The Ministry has received information about incidents of torture in penal institutions. These included, for example, the cases of beating of prisoners by personnel of the Sokalsk Penal Colony No. 47 in September 2005 року and January 2006 року. As a result of harassment, 13 prisoners tried to slash their wrists, and one person hung himself.

The Ministry of Justice also reports that there have been a number of cases where prisoners have been forced to work for particular heads of penal institutions. For example, in April 2006, a prisoner of the Lychakivsk Penal Colony No. 30 chopped off his fingers over being forced to work 2-3 shifts for the head of the colony himself. There were analogous cases in the Kharkiv region.

A lot of complaints are related to not being paid wages, both in the penal institution and upon release. Such cases have been reported from penal institutions in the Khmelnytsky, Zhytomyr and other regions.

From complaints reaching the Ministry of Justice, it also became known that in November 2006 and January 2007, due to inadequate provision of everyday and communal requirements, 55 prisoners refused to eat the food in the Bilenkivsk Colony in the Zaporizhya region, and a thousand in the Izyaslav colony in the Khmelnytsky region.

Complaints are also received of censorship of correspondence and unwarranted failure to send prisoners' applications, appeals or letters. Such cases are reported from Buchansk Colony No. 85 of the Kyiv region, and others. The Ministry of Justice has stated that an analysis of information received over the last year suggests systemic violations of prisoners' constitutional rights in Ukraine. The Minister also said that silence about such problems in society was unacceptable, and said that he believed this had come about due to the unprecedented «sovereign» status of the State Department for the Execution of Sentences, an equivalent for which could not be found in any other country.»[40]

In general the number of incidents during 2006 suggests that the human rights situation in penal institutions is not changing, or is even becoming slightly worse. As in 2005 respect for human rights and dignity has yet to become the dominant factor of penal policy, while the existing treatment of prisoners is based on strict demands of obedience imposed by the penal administration. This is compounded by the lack of an effective mechanism for lodging complaints. It should also be stressed that there has been no open analysis of the reasons for such protest actions by prisoners which have become noticeably more frequent.

[39] «Evening Kharkiv», 09.08.2006. (for more on this in English see: http://khpg.org/en/index.php?id=1155243925).
[40] Press service of the Ministry of Justice, www.minjust.gov.ua, 21.03.2007

12. CONCLUSIONS

1. Ukraine's commitment given on joining the Council of Europe in 1995 to transfer the system of the execution of judgements to the Ministry of Justice has yet to be honoured. The top management of the Department remains stubbornly against such subordination, and insists on at least a five year period for preparing the necessary conditions. At the same time, during the nine years of its existence the Department has taken no measures to prepare for such subordination at all.

2. The Department continues to adopt departmental documents which violate the rights of remand and convicted prisoners.

3. The human rights situation in penal institutions is not changing, or is even becoming slightly worse. Just as a year ago, respect for human rights and dignity has yet to become the dominant factor of penal policy, while the existing treatment of prisoners is based on strict demands of obedience imposed by the penal administration. This is compounded by the lack of an effective mechanism for lodging complaints.

4. Protest actions by prisoners have become more frequent, yet there has been no open analysis of the reasons for this development. The results of investigations into incidents which have occurred have not been made public.

5. The human rights situation is exacerbated by ill-considered staffing policy by the Department management. People are taken on, often at managerial level, who do not have the necessary experience in this area. Unfortunate staffing decisions are combined with a lack of social protection of personnel.

6. Cases of corruption have increased, yet there has been no public response from the management to such developments.

7. Access to information within the system is far too restricted. Public officials continue to not provide answers to formal requests for information. No measures are taken against employees who contravene information legislation.

8. Cooperation with the public, in the first instance, with nongovernmental organizations, is confined to material assistance for the system. The Department management avoids cooperating with organizations which have their own views on facts and events and who express criticism of the management. There are instead attempts on some issues to simulate support for the Department's position from the public.

9. As was the case a year ago, there is no public control over observance of the rights of convicted and remand prisoners, nor over the work of penal institutions.. The public councils attached to divisions of the Department and to the Department itself did not begin functioning during the year.

13. RECOMMENDATIONS

1. Complete the process of transferring the Department to the Ministry of Justice as called for in PACE Resolution № 1466 (2005)

2. Stop adopting normative legal acts and other departmental documents whose provisions violate human rights.

3. Change priorities in law creating activities, giving preference to humanitarian values over issues of the technical functioning of the department; to increase attention to issues relation to the observance of human rights, respect for the human dignity both of people imprisoned, and personnel of the penal institutions, and not just confine oneself to declarations on this subject.

4. Carry out without delay a comprehensive analysis of normative legal documents and other normative acts of the Department to determine whether they comply with international standards, involving independent specialists, including from the Penitentiary Association of Ukraine, in this work.

5. Take a thorough approach in drawing up and passing departmental normative legal documents. Observe procedure for preparing documents related to human rights. This procedure should envisage mandatory consultation with the public as required in item 3 of the «Rules of procedure

for consultations with the public on forming and implementing State policy», approved by Cabinet of Ministers Resolution No. 1378 from 15 October 2004.

6. Involve a wide range of specialists in discussion of a Strategy for reforming the penal system, and definitely introduce independent expert conclusion on the Strategy, and public debate.

7. Change approaches in staffing policy, paying considerably more attention to a careful choice of managerial staff within the bodies of the Department, and reduce to a minimum the appointment to managerial positions of people who do not have experience of the system and have not undergone the relevant checking procedure to see whether they are professionally suitable.

8. Scrupulously check all possible cases of corrupt activities by employees of the system. Publicly express the position of the Department with regard to all cases found to have substance.

9. Introduce monitoring of prisoners' conditions on a wide scale, and prepare annual reports on the state of affairs in the system by nongovernmental organizations, including on the basis of state funding, as well as the preparation of alternative reports, reports on problems or on areas of activity of the institutions;

10. Put an end to the practice of issuing unwarranted rejections of initiatives from the public to carry out independent studies and monitoring of the conditions of convicted and remand prisoners.

11. Consider the possibility of making it compulsory to become familiar with, and where possible, discuss in the Department's bodies and institutions the results of independent studies and monitoring, annual Reports prepared and carried out by civic organizations and other independent bodies, and the use where necessary of measures of response.

12. Qualitatively increase information to society about the situation and problems of the system via regularly carrying out a wide range of measures such as press conferences, roundtables, as well as simplifying the procedure for providing access of members of the public and journalists to penal institutions.

13. Strictly adhere to information legislation when informing the public on the activities of institutions and bodies of the Department, including when providing responses to formal requests for information from individuals and organizations. Use effective means of response to infringements of legislation on information by public officials and employees of penal institutions.

14. Provide the necessary conditions, including appropriate financing, for the mandatory creation in each territorial Department division of a press service.

15. Promote the introduction of public supervisory control over penal institutions, and not limit this to the work of supervisory commissions.

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Scientific edition

HUMAN RIGHTS IN UKRAINE – 2006
HUMAN RIGHTS ORGANIZATIONS REPORT

Accountable for publication
Yevgeniy Zakharov

Edition
Yevgeniy Zakharov, Irina Rapp, Volodymyr Yavorskiy

Layout
Oleg Miroshnichenko

Circulation 500 copies

Ukrainian Helsinki Human Rights Union
36 Olegivska Str., Room No. 309
Kyiv, Ukraine
http://www.helsinki.org.ua

Publishing house «Prava ludyny»
61112, Kharkiv, 10 R. Eidemana Str., apt. 37

The book is printed on the equipment of Kharkiv Human Rights Protection Group
27 Ivanova Str., № 4
Kharkiv, 61002, Ukraine
http: www.khpg.org